162 U.S. 602

162-602

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 165.

JOHN D. FEE, PLAINTIFF IN ERROR,

vs.

HENRY C. BROWN, EXECUTOR OF JANE C. BROWN, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO

FILED SEPTEMBER 30, 1892.

(15,151.)

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INDEX.

	Original.	Print.
Assignment of errors	1	1
Writ of error	4	2
Return on writ of error	5	3
Citation	6	3
Proof of service of citation	7	4
Caption	8	4
Transcript from district court	9	5
Summons	10	5
Sheriff's return	11	6
Complaint	12	6
Motion for change of venue	13	7
Order granting change of venue	15	8
Answer	16	8
Demurrer to answer	33	18
Order sustaining demurrer, &c.	34	18
Appeal to supreme court of Colorado	34	19
Præcipe for transcript	35	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 4, 1895.

	Original.	Print.
Stipulation for judgment, &c.	36	19
Judgment	38	21
Bond on appeal	40	21
Clerk's certificate	42	23
Assignment of errors	43	23
Joinder in error	48	25
Judgment	49	26
Opinion	51	26
Petition for rehearing	65	34
Order denying petition for rehearing	68	35
Petition for writ of error	69	36
Order allowing writ of error, &c.	70	36
Bond on writ of error	73	37
Clerk's certificate	77	38

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Summons	10	5
Sheriff's return	11	6
Complaint	12	6
Motion for change of venue	13	7
Order granting change of venue	15	8
Answer	16	8
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Joinder in error	48	25
Judgment	49	26
Opinion	51	26
Petition for rehearing	65	34
Order denying petition for rehearing	68	35
Petition for writ of error	69	36
Order allowing writ of error, &c.	70	36
Bond on writ of error	73	37
Clerk's certificate	77	38

1 STATE OF COLORADO, *ss:*

In the Supreme Court Thereof.

JOHN D. FEE, Appellant,
vs.
JANE C. BROWN, Appellee.

In the matter of the petition of John D. Fee, appellant, for a writ of error to the Supreme Court of the United States in the above cause.

Assignment of Errors.

Now, on this — day of July, in the year of our Lord eighteen hundred and ninety-two, in the supreme court of the State of Colorado, at Denver, Colorado, comes John D. Fee, the appellant in said action, by Fred. Betts, his attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

That the act approved June 8th, 1872, entitled "An act perfecting certain land titles therein described," did not permit the purchase with cash or military bounty land warrants of any lands located with claims arising under the seventh clause of the second article of the treaty of September 30th, 1854, which lay outside of the limits of the territory ceded by the Chippewa Indians of Lake Superior and the Mississippi to the United States by said treaty of September 30th, 1854.

II.

That said act of June 8th, 1872, applied to such lands as lay within the limits of the territory ceded by the Chippewas under the treaty of September 30th, 1854, to the United States and as had been located in good faith with claims arising under the seventh clause of the second article of said treaty by innocent holders of the same and for which patent had not yet issued, and to no others.

2 III.

That neither the act of April 24th, 1820, nor any other act of Congress whatsoever permitted the purchase at private entry of the land in controversy before it had been offered at public sale.

VI.

That the Land Department had no jurisdiction to determine that the land in controversy had been offered at public sale when, as a matter of fact, said land had never been offered and the records of said Land Department so showed; and said land having, as a matter of fact, never been offered at public sale, there is no presumption of there having been so offered that will sustain the patent for said land to Henry C. Brown, of December 1st, 1876, under the act of April 24th, 1820.

V.

That the patent to said land of December 1st, 1876, issued to Henry C. Brown under the act of June 8th, 1872, was issued without authority and is void on its face, and that the land in controversy is public land, subject to entry under the homestead laws of the United States, and that said John D. Fee was rightfully holding possession of said land under said homestead laws.

Wherefore the said John D. Fee prays that for the errors aforesaid said judgment and decision of the supreme court of the State of Colorado may be vacated and set aside and held for nought, and that the patent issued to Henry C. Brown, of the date of December 1st, A. D. 1876, may be cancelled and held for naught.

FRED. BETTS,
Attorney for John D. Fee, Pueblo, Colorado.

3 [Endorsed:] Presented June 9th, 1892. Charles D. Hayt, C. J.

4 THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

The President of the United States to the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, between John D. Fee and Jane C. Brown, a manifest error hath happened, to the great damage of the said John D. Fee, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at Washington, D. C., together with this writ, so that you have the same at Washington on the 10th day of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 31st day of August, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the 117th year.

Seal United States Circuit Court, District of Colorado.

ROBERT BAILEY, *Clerk.*

Allowed by—
CHARLES D. HAYT,
Chief Justice of the Supreme Court, State of Colorado.

5 [Endorsed:] Gen. No. —. —— court of the United States. John D. Fee, plaintiff in error, *vs.* Jane C. Brown. Writ of error. To —— court U. S., district of Colorado. Filed in —— court of the U. S. this — day of ——, A. D. 18—. —— ——, clerk, by —— ——, deputy clerk. —— ——, attorney for plaintiff in error. Filed in supreme court Aug. 31, 1892. James A. Miller, clerk.

Return.

THE UNITED STATES OF AMERICA, *State of Colorado,* } ss:

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said supreme court, at Denver, in said State, this 31st day of August, 1892.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk Supreme Court of Colorado.

6 THE UNITED STATES OF AMERICA, *District of Colorado.*

The United States of America to Jane C. Brown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, *at* to be holden at Washington, D. C., on the 10th day of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein John D. Fee is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles D. Hayt, chief justice of the supreme court of the State of Colorado, this 31st day of August, in the year of our Lord one thousand eight hundred and ninety-two.

CHARLES D. HAYT,
Chief Justice Supreme Court, State of Colorado.

7 [Endorsed:] Gen. No. —. Orig. —— court of the United States, district of Colorado. John D. Fee, plaintiff in error, *vs.* Jane C. Brown, defendant in error. Citation. Filed in —— court of the U. S. this — day of ——, A. D. 18—. —— ——, clerk, by —— ——, deputy clerk. —— ——, attorney for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

On this — day of ——, A. D. 18—, personally appeared —— —— before me, the subscriber, a clerk of the —— court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

DENVER, COLO., *Aug.* 31, '92.

I hereby acknowledge receipt of a copy of the citation and of the writ of error in the within-entitled cause on behalf of the defendant in error, Jane C. Brown.

JAMES H. BROWN,
Att'y for Def'd't in Error, Jane C. Brown.

[Torn off.]

of — defendant in error, not waiving any — that — may be in the proceedings or steps taken to secure the issuance of said writ.

JANE C. BROWN,
By JAMES H. BROWN,
Att'y-at-Law and for Def'd't in Error

8 UNITED STATES OF AMERICA, }
State of Colorado. }

In the Supreme Court.

Pleas before the honorable the supreme court of the State of Colorado on the — day of June, A. D. 1892. the same being one of the juridical days of April, A. D. 1892, term of said court.

Present: Charles D. Hayt, chief justice; Victor A. Elliott, Joseph C. Helm, judges; J. H. Maupin, attorney general; F. A. Richardson, bailiff; James A. Miller, clerk.

9 Be it remembered that heretofore and on, to wit, the 15th day of January, 1890, there was filed in the clerk's office of this court a transcript of proceedings in the district court of the 3rd judicial district in and for the county of Pueblo and State aforesaid in the certain cause therein named; and which said transcript, together with the assignments of error of said appellant thereto attached, is in words and figures as follows, to wit:

UNITED STATES OF AMERICA.

STATE OF COLORADO, } ss:
County of Pueblo, }

In the District Court, November Term, A. D. 1889.

Pleas before the Honorable Julius C. Gunter, judge of the third judicial district of the State of Colorado, and at a term of the district court of said district begun and held at the court-house, in the city of Pueblo, in said county, on the fourth Monday (being the 25th day) of November, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

Present: Honorable Julius C. Gunter, judge of said district; L. B. Gibson, Esq., deputy district attorney for said district in
10 and for said county; T. G. McCarthy, sheriff of said county; Theodore A. Sloane, clerk of said court in and for said county.

Be it remembered that heretofore, to wit, on the 9th day of August, A. D. 1889, there were filed in the office of the clerk of said court the transcript of proceedings and all papers in a certain cause entitled Jane C. Brown, plaintiff, *v.* John D. Fee, defendant, the venue of which cause was duly changed from the district court of Arapahoe county to the district court of Pueblo county and said cause docketed in the said last-named court; that said files contained the summons in said cause, the same being in the words and figures following, to wit:

STATE OF COLORADO, } ss:
Arapahoe County, }

In the District Court within and for the said County of Arapahoe.

JANE C. BROWN, Plaintiff, }
v. } Summons.
JOHN D. FEE, Defendant. }

The People of the State of Colorado to John D. Fee, the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of
11 Arapahoe county, State of Colorado, in which said court, county, and State the complaint in the above-entitled action will be filed, and to answer the complaint therein within twenty days after the service hereof, if served within the county, or, if served out of the county or by publication, within forty days after the service hereof, exclusive of the day of service, or judgment by default will be taken against you according to the prayer of the complaint in said action, a copy of which is hereto annexed.

Given under my hand, at Denver, in said county, this eighth (8th) day of May, A. D. 1889.

JAMES H. BROWN,
Attorney for Plaintiff, Jane C. Brown,
Rooms 4, 5, & 6, No. 1122 16th St., Denver, Colorado.

STATE OF COLORADO, } ss:
Pueblo County, }

I do hereby certify that I have duly served the within summons on this the 9th day of May, A. D. 1889, by delivering to the within-named defendant, John D. Fee, the said defendant, personally, in the county of Pueblo, a copy of the said summons, together with a copy of the complaint in the action therein mentioned, thereto attached.

T. G. McCARTHY, *Sheriff.*

12 That said files contained the complaint in said cause, the first cause of action in said complaint being in the words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Arapahoe, }

In the District Court in and for said County.

JANE C. BROWN, Plaintiff, }
v.
JOHN D. FEE, Defendant. }

The said plaintiff complains of the said defendant, and as grounds therefor alleges—

For a first cause of action

That on the 6th day of April, A. D. 1889, and long prior thereto, to wit, ever since the seventh (7th) day of July, A. D. 1879, the said plaintiff was seized in fee-simple absolute and possessed of and entitled to the immediate possession of that certain tract of land situated in the county of Pueblo, in the State of Colorado, described as follows, to wit: The southwest quarter of the northwest quarter of section number thirty (30), in township number twenty (20) south, of range sixty-four (64) west, saving and excepting the right of way of the Denver & Rio Grande Railroad Company, one hundred (100) feet in width, running from north to south through said land.

13 That while the plaintiff was so seized the said defendant, John D. Fee, afterwards, and on or about the seventh day of April, A. D. 1889, and without any right or title, entered into possession of the demanded premises and ousted and ejected plaintiff therefrom and now unlawfully withholds the possession thereof from the plaintiff, to her damage in the sum of ten thousand ($10,000.00) dollars.

That the value of the rents, issues, and profits of said premises

from the said seventh day of April, A. D. 1889, and which the plaintiff had been excluded therefrom by the defendant, is one hundred ($100.00) dollars.

That said files contained the motion for a change of venue in said cause, said motion being in the words and figures following, to wit:

STATE OF COLORADO, *County of Arapahoe,* } ss:

In the District Court in and for said County.

JANE C. BROWN, Plaintiff, v. JOHN D. FEE, Defendant. } Motion for a Change of Venue.

Now comes the defendant, by his attorney, herein and moves the court for a change of venue herein to the district court of Pueblo county for the following reasons, to wit: First, because the complaint herein shows on its face that the county of Arapahoe is not the proper county in which to try said action, and, second, because the complaint herein shows on its face that the county of
14 Pueblo is the proper county in which to try said action.

FRED. BETTS,
Attorney for Defendant.

That said files contained the transcript of the proceedings and order of the district court of Arapahoe county made on said motion for change of venue and exceptions thereto, and said transcript is in the words and figures following, to wit:

STATE OF COLORADO, *County of Arapahoe,* } ss:

District Court, Arapahoe County.

Pleas in the district court of Arapahoe county, State of Colorado, in the second division thereof, at a regular term begun and held at the court-house, in the city of Denver, in said county, on the second Tuesday (it being the 9th day) of April, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: Honorable Thomas B. Stuart, on- of the judges of said court; Isaac N. Stevens, Esq., district attorney of said district; Albert H. Weber, Esq., sheriff of said county; William T. Jenison, Esq., clerk of said court.

Be it remembered that heretofore and on, to wit, the 29th day of July, A. D. 1889, the same being one of the regular judicial days of the April term, A. D. 1889, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

15 JANE C. BROWN v. JOHN D. FEE. } 10829. Ejectment.

At this day comes the plaintiff, by J. H. Brown, Esq., her attorney, and the defendant, by Fred. Betts, Esq., his attorney, also comes; and thereupon this cause, coming on to be heard upon the defendant's motion to change the venue of this cause to the district court of Pueblo county, is argued by counsel, and the court being sufficiently advised in the premises—

It is ordered by the court that the venue in this cause be changed to the district court, sitting in and for the county of Pueblo, and let the clerk of this court make a transcript of the proceedings herein and certify the same to said district court of Pueblo county.

And afterwards, on, to wit, November 28th, A. D. 1889, said defendant filed in the district court of Pueblo county, by Fred. Betts, Esq., his attorney, an answer to the complaint of the plaintiff, which answer contained the general denial of defendant to the complaint of plaintiff and an affirmative answer to the first cause of action of plaintiff, the same being in the following words and figures, to wit:

16 STATE OF COLORADO, *County of Pueblo,* } *ss:*

In the District Court in and for said County.

JANE C. BROWN, Plaintiff, v. JOHN D. FEE, Defendant. } Answer of Defendant.

Now comes the defendant herein and for an answer to the first cause of action in the complaint of plaintiff herein says:

He denies that on the 6th day of April, A. D. 1889, or that long prior thereto, or at any time, or at all, said plaintiff was seized in fee-simple absolute or in any manner whatsoever of the southwest quarter of the northwest quarter of section number thirty (30), in township twenty (20) south, of range sixty-four (64) west, saving and excepting the right of way of the Denver and Rio Grande Railroad Company, one hundred feet in width, running from north to south through said lands, as in the complaint of plaintiff herein alleged.

Denies that on said 6th day of April, A. D. 1889, or that long prior thereto, or that ever at any time whatsoever, plaintiff herein was ever possessed of or entitled to the immediate possession or any possession whatever of the hereinbefore-described tract of land.

Denies that the defendant herein, on or about the 7th day of April, A. D. 1889, or at any other time whatsoever, without any right or title, entered into the possession of the demanded premises.

17 Denies that he, upon said 7th day of April, A. D. 1889, or at any other time whatsoever, *he* ousted or ejected plaintiff therefrom.

Denies that he unlawfully withholds the possession thereof from plaintiff; denies that plaintiff is or was damaged in the sum of ten thousand dollars or in any sum whatsoever by reason of anything done concerning the use, occupation, detention, or possession by this defendant of the said premises in controversy.

Denies that the value of the rents, issues, and profits of said premises from said seventh day of April, A. D. 1889, are or were one hundred dollars; denies that said rents, issues, or profits of said premises from the 7th day of April, A. D. 1889, are or were of any value whatsoever.

Defendant, further answering the complaint of plaintiff in said first cause of action, alleges—

That on or about the 31st day of August, A. D. 1889, he, the said John D. Fee, the defendant herein, was qualified to enter under the homestead laws of the United States a legal subdivision or subdivisions, not exceeding one hundred and sixty acres, of the public lands.

That the southeast quarter of the northeast quarter of section twenty-five (25), in township twenty (20) south, range 65 west, and the southwest quarter of the northwest quarter of section thirty (30), in township 20 south, range 64 west, in the county of Pueblo and State of Colorado, were public lands, subject to entry under the homestead laws of the United States; that defendant, on or about said 31st day of August, went upon said lands and made valuable improvements thereon; that on or about the fourth
18 day of September, A. D. 1888, while said land was still subject to homestead entry as aforesaid and while defendant was still qualified to enter said land as a homestead as aforesaid, said defendant settled upon and established his residence upon the same with the intention of duly entering said land as a homestead.

That on or about the 12th day of September, A. D. 1888, the said defendant was still duly qualified to enter said land as a homestead as aforesaid, and said land was still subject to homestead entry as aforesaid.

That on said 12th day of September, A. D. 1888, he, the said John D. Fee, the defendant herein, made application in writing in due form to so enter said land as such homestead under said homestead laws of the United States and presented his application to so enter said land to the register of the United States land office at Pueblo, Colorado, and he, the said John D. Fee, the defendant herein, then and there duly tendered to the receiver of said land office all legal fees and commissions due on making said application as aforesaid, and defendant avers that the aforesaid homestead application is now pending and is still undetermined in the Land Department of the United States.

And the defendant further avers that he has ever since said 12th day of September, A. D. 1888, and is now residing upon, holding,

occupying, improving, cultivating, and claiming said lands under said homestead laws of the United States as aforesaid.

And defendant further alleges that prior to the 9th day of February, A. D. 1867, there was duly issued to one Mary (Marie) Dauphinais by the Commissioner of Indian Affairs, under and by virtue of the treaty of September 30th, 1854, between the United
19 States and Chippewas of Lake Superior and the Mississippi (see vol. 10, U. S. Statutes at Large, 1110), a certificate designated as "No. 45 D," which said certificate identified said Mary Dauphinais as being one of the persons described in the provisions contained in said treaty of September 30th, 1854, as being entitled, under the provisions of the seventh clause of the second article of said treaty, to eighty acres of land, as therein provided. Said certificate "No. 45 D" further provided "that any sale, transfer, mortgage, assignment, or pledge of the same or any right accruing thereunder would not be recognized as valid by the United States, and that the patent for lands located by virtue thereof should be issued directly to said Mary Dauphinais, the reservee named therein, or to her heirs, and should in nowise enure to the benefit of any other person or persons whatsoever. Said certificate "No. 45 D" further recited that the object and purpose of the same was to identify the said Mary Dauphinais as one of the persons entitled to the benefit of the provisions of the seventh clause of the second article of the treaty aforesaid."

That on or about said 9th day of February, 1867, one Daniel Witter, who then and there claimed to be the duly authorized attorney-in-fact of said Mary Dauphinais, made, as attorney-in-fact for said Mary Dauphinais and in the name of said Mary Dauphinais, at the United States land office at Denver, Colorado, with said certificate "No. 45 D," a location of the said southeast quarter of the northeast quarter of section 25, township 20 south, range 65 west, and of said southwest quarter of the northwest quarter of section 30, in township 20 south, range 64 west, in the county
20 of Pueblo and State of Colorado, which said lands were then within the district of lands subject to sale at Denver city, Colorado; and defendant avers, upon information and belief, that said location was made at the request of and for the benefit of one Henry C. Brown, and the said Mary Dauphinais knew nothing of said location and never saw said land.

That pursuant to said location as aforesaid a patent for said land was, on the 29th day of December, A. D. 1868, issued to said Mary Dauphinais in words and figures as follows, to wit:

Certificate No. 45 D.

The United States of America to all — whom these presents shall come, Greeting:

Whereas by the 7th clause of the second article of the treaty with the Chippewas of Lake Superior and the Mississippi, dated 30th September, 1854, it is provided that each head of a family or

single person over twenty-one years of age at the present time of the mixed bloods belonging to the Chippewas of Lake Superior shall be entitled to eighty acres of land, to be selected by them under the direction of the President;

And whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Denver city, No. 1, whereby it appears that Chippewa certificate "No. 45 D," in the name of Mary Dauphinais, for eighty acres, issued by the Commissioner of Indian Affairs under the aforesaid treaty, has been located and surrendered by the said Mary Dauphinais in full satisfaction for the southeast quarter of the northeast quarter of section twenty-five, in township twenty south, of range sixty-five west, and the southwest quarter of the northwest
21 quarter of section thirty, in township twenty south, of range sixty-four west, in the district of lands subject to sale at Denver city, Colorado Territory, containing eighty acres, according to the official plat of the public lands returned to the General Land Office by the surveyor general, which said tract has been located by said Mary Dauphinais:

Now, know ye that the United States of America, in consideration of the premises, have given and granted, and by these presents do give and grant, unto the said Mary Dauphinais and her heirs the said tract above described:

To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Mary Dauphinais and to her heirs and assigns forever.

In testimony whereof I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-third.

By the President:

[SEAL.] ANDREW JOHNSON,
By FRANK COWEN, *Secretary.*

MARTIN BUEL,
Acting Recorder of the General Land Office ad Interim.

Recorded, vol. 2, page 15.
Examined.

22 And defendant further avers that on or about the 10th day of January, A. D. 1867, the said Mary Dauphinais subscribed and acknowledged, in the county of La Pointe and State of Wisconsin, before one James Chapman, purporting to be a notary public in and for the cou-ty and State aforesaid, a certain paper purporting to be a power of attorney authorizing the sale and conveyance by a good and sufficient deed or deeds of the said S. E. ¼ of the N. E. ¼ of section 25, township 20 south, range 65 west, and the said S. W. ¼ of the N. W. ¼ of section 30, township 20 south, range 64 west.

occupying, improving, cultivating, and claiming said lands under said homestead laws of the United States as aforesaid.

And defendant further alleges that prior to the 9th day of February, A. D. 1867, there was duly issued to one Mary (Marie) Dauphinais by the Commissioner of Indian Affairs, under and by virtue of the treaty of September 30th, 1854, between the United States and Chippewas of Lake Superior and the Mississippi (see vol. 10, U. S. Statutes at Large, 1110), a certificate designated as "No. 45 D," which said certificate identified said Mary Dauphinais as being one of the persons described in the provisions contained in said treaty of September 30th, 1854, as being entitled, under the provisions of the seventh clause of the second article of said treaty, to eighty acres of land, as therein provided. Said certificate "No. 45 D" further provided "that any sale, transfer, mortgage, assignment, or pledge of the same or any right accruing thereunder would not be recognized as valid by the United States, and that the patent for lands located by virtue thereof should be issued directly to said Mary Dauphinais, the reservee named therein, or to her heirs, and should in nowise enure to the benefit of any other person or persons whatsoever. Said certificate "No. 45 D" further recited that the object and purpose of the same was to identify the said Mary Dauphinais as one of the persons entitled to the benefit of the provisions of the seventh clause of the second article of the treaty aforesaid."

That on or about said 9th day of February, 1867, one Daniel Witter, who then and there claimed to be the duly authorized attorney-in-fact of said Mary Dauphinais, made, as attorney-in-fact for said Mary Dauphinais and in the name of said Mary Dauphinais, at the United States land office at Denver, Colorado, with said certificate "No. 45 D," a location of the said southeast quarter of the northeast quarter of section 25, township 20 south, range 65 west, and of said southwest quarter of the northwest quarter of section 30, in township 20 south, range 64 west, in the county of Pueblo and State of Colorado, which said lands were then within the district of lands subject to sale at Denver city, Colorado; and defendant avers, upon information and belief, that said location was made at the request of and for the benefit of one Henry C. Brown, and the said Mary Dauphinais knew nothing of said location and never saw said land.

That pursuant to said location as aforesaid a patent for said land was, on the 29th day of December, A. D. 1868, issued to said Mary Dauphinais in words and figures as follows, to wit:

Certificate No. 45 D.

The United States of America to all — whom these presents shall come, Greeting:

Whereas by the 7th clause of the second article of the treaty with the Chippewas of Lake Superior and the Mississippi, dated 30th September, 1854, it is provided that each head of a family or

single person over twenty-one years of age at the present time of the mixed bloods belonging to the Chippewas of Lake Superior shall be entitled to eighty acres of land, to be selected by them under the direction of the President;

And whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Denver city, No. 1, whereby it appears that Chippewa certificate "No. 45 D," in the name of Mary Dauphinais, for eighty acres, issued by the Commissioner of Indian Affairs under the aforesaid treaty, has been located and surrendered by the said Mary Dauphinais in full satisfaction for the southeast quarter of the northeast quarter of section twenty-five, in township twenty south, of range sixty-five west, and the southwest quarter of the northwest
21 quarter of section thirty, in township twenty south, of range sixty-four west, in the district of lands subject to sale at Denver city, Colorado Territory, containing eighty acres, according to the official plat of the public lands returned to the General Land Office by the surveyor general, which said tract has been located by said Mary Dauphinais:

Now, know ye that the United States of America, in consideration of the premises, have given and granted, and by these presents do give and grant, unto the said Mary Dauphinais and her heirs the said tract above described:

To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Mary Dauphinais and to her heirs and assigns forever.

In testimony whereof I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-ninth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-third.

By the President:

[SEAL.] ANDREW JOHNSON,
By FRANK COWEN, *Secretary*.

MARTIN BUEL,
Acting Recorder of the General Land Office ad Interim.

Recorded, vol. 2, page 15.
Examined.

22 And defendant further avers that on or about the 10th day of January, A. D. 1867, the said Mary Dauphinais subscribed and acknowledged, in the county of La Pointe and State of Wisconsin, before one James Chapman, purporting to be a notary public in and for the cou-ty and State aforesaid, a certain paper purporting to be a power of attorney authorizing the sale and conveyance by a good and sufficient deed or deeds of the said S. E. ¼ of the N. E. ¼ of section 25, township 20 south, range 65 west, and the said S. W. ¼ of the N. W. ¼ of section 30, township 20 south, range 64 west.

And defendant avers on information and belief that the aforesaid pretended power of attorney and the paper purporting to be a power of attorney, by virtue of which the said Daniel Witter, as the pretended attorney-in-fact of the said Mary Dauphinais, made the pretended location with said certificate "No. 45 D" upon the hereinbefore-described eighty acres in controversy, were both executed by the said Mary Dauphinais in blank and filled up by the said Daniel Witter in such manner as said Witter saw fit after said pretended powers of attorney were delivered to him, and defendant avers that said pretended power of attorney of the date of January 10th, A. D. 1867, by virtue of which said Daniel Witter pretended to be authorized to sell and convey said lands and give a sufficient deed or deeds therefore, purports to have been executed and acknowledged in the county of La Pointe and State of Wisconsin before James Chapman, a notary public in and for said county and State; but defendant avers that there was affixed to the said certificate of acknowledgment of said James Chapman to the aforesaid power of attorney no certificate by the clerk of any court of record of the city, county, or district wherein said Chapman then
23 resided, under the seal of such court, and no certificate of any officer whomsoever showing that said James Chapman was on said 10th day of January, 1867, or at any other time a duly qualified and acting notary public in and for said county of La Pointe, in the State of Wisconsin, or that he had any authority whatsoever by the laws of said State of Wisconsin to take and certify said acknowledgement, or that the signature to said acknowledgement was the true signature of said James Chapman, as required by the statute in such case made and provided, and defendant avers that no copy of the notorial commission of said James Chapman, certified to by the secretary of state of said State of Wisconsin, under the seal of said State of Wisconsin, was ever recorded in the office of the clerk and recorder of the county of Pueblo, in the State of Colorado, as required by the statute in such case made and provided.

And defendant avers that the said pretended power of attorney was void and gave the said Daniel Witter no authority whatsoever to convey said land to said Henry D. Brown; and defendant avers the said Daniel Witter, acting under the authority of said void power of attorney, on or about the 25th day of January, A. D. 1869, as the attorney-in-fact of said Mary Dauphinais, pretended to convey said land by general warranty deed to said Henry C. Brown, and that the said Brown never acquired any interest in said land whatsoever by said deed and never was prior to the beginning of this action the owner of any interest of said Mary Dauphinais in and to said land; that thereafter, on or about the 11th day of May, A. D. 1875, the said scrip patent issued December 29th, 1868, was held for cancellation, and at about said date the register and
24 receiver of the United States land office at Pueblo, Colorado, received from the Commissioner of the General Land Office, at Washington, D. C., a letter concerning the said t'p 20 S., S. E. ¼ of the N. E. ¼ of sec. 25, township 20 south, R. 65, and the said

S. W. ¼ of the N. W. ¼ of sec. 30, range 64 west, in words and figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May 11th*, 1875.

Register & receiver, Pueblo, Colorado.

GENTLEMEN: Referring to decisions of the supreme court of California to the effect that the scrip issued by the Department of the Interior under the treaty of the 30th of Sept., 1854, with the Chippewas of Lake Superior and the Mississippi was issued without authority of law, and that the patents founded on the location of said scrip are void on their face, I have to state that in a communication addressed to this office, under date of March 29th last, the Secretary of the Interior has decided that the act approved June 8th, 1872—Statutes, vol. 17, page 340—is, in his judgment, broad enough to cover the cases of location of said scrip in the State of California and elsewhere and to entitle the *bona fide* holders of the lands embraced in the said locations to the relief provided in the said act.

The Secretary, under the authority vested in him by the said act and in view of the strong equities attaching to the cases under consideration, fixes the price at which such *bona fide* holders of the said lands shall be permitted to purchase the same at $2.50 per acre.

25 I have therefore to direct that you give notice to the *bona fide* holders of the lands embraced in the location of the scrip enumerated in the accompanying list to the effect that he will be allowed 60 days from date of notice in which to appear at your office and make surrender of the patent, to be accompanied by a duly executed deed of relinquishment to the United States of all right and title to the tracts acquired under said patent, together with a certificate of the recorder or other officer having charge of the records of the county wherein such tracts may be situated to the effect that the said deed of relinquishment has been duly recorded by him; that the said records show no other consequence or incumbrance of said lands by the party executing the deed as aforesaid, and that the said records show the title to the said lands to be in the party making such deed; that said deed may be executed on the back of the patent.

On a strict compliance with the foregoing relinquishment you are hereby authorized to allow the party *an* interest to make payment for said lands with cash or military bounty land warrants at $2.50 per acre.

The certificate of entry or location, as the case may be, to bear across their face in red ink a reference to this letter by its date. Be pleased to acknowledge the receipt of this letter.

Very respectfully,

S. S. BURDETT,
Commissioner.

The "accompanying list" referred to in the aforesaid letter is in words and figures as follows, to wit:

"*List*

"of locations of land with Chippewa half-breeds scrip
26 made at Denver, Colorado, which lands now lie in the Pueblo land dist., and for which patent has issued, to wit, scrip No. 45 D, Mary Dauphinais, for S. E. ¼ N. E. ¼, section 25, t'p 20 S., range 65 W., and S. W. ¼ N. W. ¼, sec. 30, t'p 20 S., range 64 W., R. & R. No. 1."

That thereafter, on, to wit, the 20th day of May, A. D. 1875, said Henry C. Brown, pursuant to the aforesaid Commissioner's letter of May 11th, 1875, executed a deed of relinquishment to the United States, as in said letter provided; that said deed of relinquishment was filed for record in the office of the clerk and recorder of said Pueblo county on the 8th day of June, A. D. 1875, at 5.30 o'clock p. m., and was duly recorded in pages 602 and 603 of Book 10 of said Pueblo county records.

That said deed of relinquishment first sets forth a true copy of the patent of the date of Dec. 29th, 1868, from the United States to Mary Dauphinais for said eighty acres of land, as hereinbefore set forth, and thereafter is in words and figures as follows, to wit:

"Know all men by these presents that in pursuance of the provisions of the act of Congress approved June 8th, 1872, entitled An act to perfect certain land titles therein described, and in accordance with the instructions of the Secretary of the Interior and Commissioner of the General Land Office thereupon, and in order that I may enter said lands and receive a patent therefore under the provisions of the act aforesaid, I, Henry C. Brown, grantee of Mary Dauphinais, to whom the within patent for the S. E. ¼ of the N. E. ¼ of sec. 25, township 20 south, range 65 west, and S. W. ¼ of N. W. ¼ of section 30, township 20 S., range 64 west, in the district of
27 lands subject to sale at Denver city, Colorado Territory, containing 80 acres, was issued, do hereby surrender and relinquish unto the United States of America all my right, title, and interest of, in, and to said land under the within patent.

In testimony whereof I have hereunto set my hand and seal this 20th day of May, 1875.

Attest: HENRY C. BROWN. [SEAL.]"

That said deed of relinquishment was, on the 20th day of May, A. D. 1875, duly acknowledged by said Henry C. Brown before William D. Todd, a duly qualified and acting notary public in and for the county of Arapahoe, in the Territory of Colorado.

That prior to the 19th day of July, A. D. 1876, and during the time allowed by the said letter of the Commissioner of the General Land Office of May 11th, 1875, the said Henry C. Brown appeared at the said land office at Pueblo, Colorado, and made a surrender and relinquishment of the said patent of Dec. 29th, 1868, from the

United States to said Mary Dauphinais for said eighty acres of land, as in the said letter of the Commissioner under date of May 11th, 1875, required, together with an application to purchase said eighty acres, under the act of Congress of June 8th, 1872, Statutes at Large, vol. 17, page 340; that said relinquishment and surrender, with said patent surrendered as aforesaid, and said application to purchase said land under said act of June 8th, 1872, were duly forwarded to the Commissioner of the General Land Office; that on or about the 19th day of July, A. D. 1876, the said scrip patent of Dec. 29th, 1868, issued to said Mary Dauphinais for said eighty acres of land, was actually cancelled by the said Commissioner of the General Land Office.

That on or about said 19th day of July, A. D. 1876, the said Commissioner of the General Land Office addressed and forwarded
28 to the register and receiver of the United States land office at Pueblo, Colorado, a letter concerning said lands in words and figures as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 19th*, 1876.

Register & receiver, Pueblo, Colo.

GENTLEMEN: Referring to the letter of this office to you, bearing date Nov. 1st, 1875, in the matter of the case of B. M. Smith *v.* H. C. Brown, involving the right to purchase the S. E. ¼, N. E. ¼, sec. 25, t'p 20 S., R. 65 W., and S. W. ¼, N. W. ¼, sec. 30, t'p 20 S., R. 64 W., Col., under act of June 8th, 1872, I have to advise you that on the 6th inst. the Hon. Secretary of the Interior approved the decision of this office rendered Sept 2nd, 1875, in favor of Brown.

Mr. Brown's application to purchase is herewith returned to you. In receipt of the purchase-money you will issue certificate in this case, giving the same the proper number of your current cash series and make a reference, in red ink, on the face of certificate to letter of instructions to you under date of May 11th, 1875.

Copy of the Secretary's decision herewith.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

That pursuant to the instructions contained in said letters of the said Commissioner, bearing date May 11th, 1875, and July 19th, 1876, respectively, the said Henry C. Brown was permitted
29 by the said register and receiver of the land office at Pueblo, Colo., on the 2nd day of August, A. D. 1876, to make private cash entry of said tract under said act of June 8th, 1872; that said certificate referred to in said letter of the Commissioner of July 19th, 1876, was numbered "1728" and dated "Land office at Pueblo, Colo., Aug. 2, 1876;" that said certificate contained the following recital, to wit:

"It is hereby certified that, in pursuance of law, Henry C. Brown, of Arapahoe county, State of Colorado, on this day purchased of the register of this office the lot or S. E. ¼ N. E. ¼, sec. 25, t'p 20 S.,

R. 65 west, and the S. W. ¼ of N. W. ¼ of section No. thirty (30), in township No. twenty (20) south, of range No. 64 west, containing eighty acres, at the rate of two dollars and fifty cents per acre, amounting to two hundred dollars and — cents, for which the said Henry C. Brown has made payment in full as required by law.

"Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Henry C. Brown shall be entitled to receive a patent for the lot above described.

"KEYES DANFORTH, *Register.*"

That the aforesaid certificate had written across its face in red ink the following endorsement, to wit:

"Entry allowed in accordance with instructions contained in Com.'s letter 'C' of July 19th, 1876."

That the "receiver's receipt" issued by virtue of said entry was numbered "1728" and was dated at the "Receiver's office at Pueblo, Colo., Aug. 2, 1876," and contained the following recital, to wit:

30 "Received from Henry C. Brown, of Arapahoe county, Colorado, the sum of two hundred dollars and — cents, being in full for the S. E. ¼ N. E. ¼ of sec. 25, township 20 S., R. 65 W., S. W. ¼ N. W. ¼ of sec. 30, T. 20 S., R. 64 west, $2.50 per acre, $200.00.

M. H. FITCH, *Receiver.*"

That across the face of said receipt, in red ink, was the following endorsement, to wit:

"Private entry. Entry allowed in accordance with instructions contained in Com.'s letter 'C' of July 19, 1876."

That the "duplicate receiver's receipt" issued by virtue of said entry was on its face a true copy of the aforesaid "receiver's receipt;" that said duplicate receiver's receipt had across its face, in red ink, the following endorsement, to wit:

"Private entry."

"Duplicate."

"Entry allowed in accordance with instructions Com.'s letter 'C' of July 19th, 1876."

That upon the back of said "duplicate receiver's receipt" were the following endorsements, to wit:

"1728." "Private cash entry."

"Sec. 25, T. 20 S., 65 W. Henry C. Born."

" 30, " 20 S., 64 "

"U. S. land office, Pueblo, Colo., Aug. 2, 1876."

"Entry allowed in accordance with inst. con. in Com. letter 'C' of July 19, 1876."

That the aforesaid "receiver's receipt" was on or about the said 2nd day of August, 1876, at 3 o'clock p. m. of said day, filed
31 for record in the office of the clerk and recorder of said Pueblo county, and was duly recorded on page 309 of Book 17 of Pueblo county records; that across the face of the record of

said receiver's receipt there was written, in red ink, "Private entry. Entry allowed in accordance with instructions contained in Com.'s letter 'C' of July 19, 1876."

That the aforesaid certificate No. 1728 was deposited in the General Land Office, and that by virtue thereof the President of the United States, under and by virtue of said act of June 8th, 1872, issued to said Henry C. Brown, under the seal of the General Land Office, a patent for said eighty acres of land in controversy.

And the defendant avers that the said "act of June 8th, 1872," did not and does not authorize the issuance by the President or any officers of the United States of any patent for any lands situated outside of the territory ceded to the United States by the treaty of Sept. 30th, 1854, with the Chippewas of Lake Superior and the Mississippi, and that none of the lands ceded to the United States by the terms of said treaty are situated within the State of Colorado.

And defendant further avers that neither the said S. E. ¼ of the N. E. ¼ of said sec. 25, township 20 south, range 65 west, nor the said S. W. ¼ of the N. W. ¼ of sec. 30, township 20 south, range 64 west, have ever been offered at public sale to the highest bidder under the provisions of the "act of Congress approved April 24th, 1820" (Stat. at Large, 556), and are not and never have been subject to purchase at private entry under any law whatsoever.

And defendant avers that said patent issued to said Henry C. Brown on the 1st of December, 1876, as aforesaid, refers therein to the aforesaid "certificate No. 1728," upon which the same was issued, and recites the fact "that the said Henry C. Brown has de-
32 posited in the General Land Office of the United States the said certificate of the register of the land office at Pueblo, Colorado, whereby it appears that the said Henry C. Brown has made full payment for the eighty acres in controversy according to the provisions of the "act of Congress of the 24th of April, 1820," entitled "An act making further provisions for the sale of public lands;" and said patent further provides "that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Henry C. Brown and to his heirs the said tracts above described," and that said patent is unintelligible without a reference to said certificate No. 1728, and to the Commissioner's letters of July 19th, 1876, and May 11th, 1875, aforesaid, and that said certificate and letters became thereby a part of said patent, and defendant avers that through said patent issued to said Henry C. Brown by the United States on the 1st of December, A. D. 1876, and through the aforesaid receiver's receipt issued by the receiver of the United States land office at Pueblo, Colorado, on the 2nd day of August, A. D. 1876, to the said Henry C. Brown, the plaintiff herein, the said Jane C. Brown by divers mesne conveyances acquired to said eighty acres in controversy whatsoever title she now has or had at the commencement of this action.

And defendant avers that neither the said receiver's receipt nor

the said patent gave to the said Henry C. Brown any title or interest whatsoever in or to said eighty acres of land, but, on the contrary, that both said receiver's receipt and said patent were issued without any authority of law so to do and are void on their face and are no evidence of any title whatsoever of plaintiff in or to said
33 lands and convey no interest whatsoever in or to the same, and that the title to the same is still in the United States, and that said lands are public lands, subject to homestead entry under the laws of the United States, as hereinbefore set forth.

And afterward, on, to wit, December 2nd, 1889, said plaintiff, by his attorneys, M. B. Gerry and Jas. H. Brown, Esquires, filed in the office of the clerk of said Pueblo county district court his demurrer to the said answer of defendant, the same being in the words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Pueblo, }

In the District Court in and for the said County.

JANE C. BROWN, Plaintiff, }
v. } Demurrer.
JOHN D. FEE, Defendant. }

Now comes the plaintiff and demurs severally to the second and third answers of defendant to plaintiff's first cause of action in the complaint herein, and for ground of demurrer alleges as to each said answers that the same do not state facts sufficient to constitute a cause of action.

JAMES H. BROWN,
Attorney for Plaintiff.

34 PUEBLO, COLO., 1889.

I hereby acknowledge service upon me of a copy of the above and foregoing demurrer.

FRED. BETTS,
Attorney for Defendant.

And afterwards, on, to wit, December 20, A. D. 1889, the same being one of the regular days of said November term, A. D. 1889, of said Pueblo county district court, the officers first above named being present, the following, among the proceedings, was had and done and entered of record, to wit:

JANE C. BROWN, Plaintiff, }
v. } G. D. No. 2711.
JOHN D. FEE, Defendant. }

The court having heretofore heard argument of counsel upon the demurrer of the plaintiff to the answer of said defendant, and being now fully advised as to the same—

It is considered that defendant's answer is not sufficient in law,

and that said demurrer should be sustained, and it is now ordered that said demurrer be, and the same is, sustained.

The defendant, by his counsel, excepts to the said order of the court and prays an appeal to the supreme court of the State of Colorado herein, which is allowed by the order of the court upon the condition that defendant within sixty days from this day tender his bill of exceptions, and also that within said time he file
35 an appeal bond in the sum of three hundred dollars, to be approved by the clerk of this court.

And afterward, to wit, on January 10th, 1890, there was filed for record the præcipe of defendant, the same being in the words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Pueblo, }

In the District Court in and for said County.

JANE C. BROWN, Plaintiff, }
v.
JOHN D. FEE, Defendant. }

To T. A. Sloane, clerk of said district court.

SIR: Please include in your transcript of the record for the supreme court in the above cause (1) a copy of the summons; (2) a copy of the first cause of action in the complaint; (3) a copy of the motion for a change of venue, and (4) the order of the court therein and exceptions of plaintiff thereto; (5) a copy of the general denial and the affirmative answer of defendant to the first cause of action of plaintiff, as set forth in the answer of defendant; (6) a copy of the demurrer of plaintiff thereto; (7) a copy of the judgment on said demurrer and the exceptions of defendant thereto, a copy of the judgment on the general denial, and the original bill of exceptions.

FRED. BETTS,
Attorney for Defendant.

36 And afterward, on, to wit, January 13, 1890, the certain stipulation of the parties in said cause for judgment was filed; which stipulation is in words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Pueblo, }

In the District Court Thereof.

JANE C. BROWN, Plaontiff, }
v.
JOHN D. FEE, Defendant. }

And now come parties, plaintiff and defendant, hereto, by their respective attorneys of record in said cause, and stipulate as follows—that is to say:

First. The plaintiff, Jane C. Brown, hereby dismisses the second and third cause of action in said complaint set forth and all rights thereunder in anywise accruing, and rests her whole case on the first cause of action set forth in said complaint.

Second. That for the purposes of these proceedings only it is hereby stipulated that said plaintiff has offered in evidence a patent from the United States to one Henry C. Brown for the premises in dispute in this case, said patent bearing date of December 1, 1876, and also a certain mesne conveyance from the said Henry C. Brown to one Frank Owers, and also a like conveyance from the said Owers to the plaintiff, Jane C. Brown, over the objections of the defendant herein, and the judgment be entered in favor of plaintiff for
37 the possession of the said described premises, according to the prayer of the complaint; that said judgment shall be entered *pro forma* and merely for the purpose of settling the issues raised herein, and that the clerk of this court be hereby authorized and instructed to enter said judgment in pursuance of this stipulation.

Third. That this cause be tried in the supreme court on the issue tendered by the separate answer of the defendant herein and the demurrer to the same hereto filed—

It being the intent of the parties hereto that this cause be fully tried on the first cause of action set forth in the complaint, the separate answer filed in said cause in answer thereto, and the demurrer to said answer with like effect as if the said patent and the said mesne conveyances from Henry C. Brown to Frank Owers and from Frank Owers to plaintiff, Jane C. Brown, had been offered in evidence by the plaintiff and directly passed upon by the court and admitted in evidence and proper exceptions thereto preserved by the defendant, and all the papers described in defendant's answer or set up *in hæc verba* in said answer had been likewise offered in evidence on the actual trial of the cause, the same overruled, and proper exceptions preserved thereto.

Dated January 11th, 1890.

JANE C. BROWN,
By M. B. GERRY,
Her Attorney.
JOHN D. FEE,
By FRED. BETTS,
His Attorney.

38 And afterwards, on, to wit, the 13th day of January, 1890, pursuant to the terms of said stipulation, a judgment was entered in said cause by the clerk of said court; which judgment is in the words and figures following, to wit:

STATE OF COLORADO, } ss:
County of Pueblo, }

In the District Court of the Third Judicial District of the State of Colorado within and for the County of Pueblo.

JANE C. BROWN, Plaintiff, }
v. } G. D. No. 2711. Judgment.
JOHN D. FEE, Defendant. }

On this 13th day of January, A. D. 1890, the parties to this cause, by the attorneys, file their stipulation in writing herein, whereby the clerk of the said court is authorized to enter judgment dismissing this action against said defendant as to the second and third causes of action, and judgment for possession and costs of suit in favor of plaintiff and against defendant upon the first cause of action.

Whereupon, pursuant to said stipulation, it is ordered, adjudged, and decreed that said defendant, John D. Fee, go hence from this proceeding, so far as the second and third causes of action, as set forth in plaintiff's complaint, are concerned; and as to the
39 first cause of action in plaintiff's complaint set forth, it is considered, ordered, and adjudged that the plaintiff, Jane C. Brown, is well entitled to hold the premises in controversy in fee-simple, to wit, that certain tract of land situated in the county of Pueblo, in the State of Colorado, described as follows: The southwest quarter of the northwest quarter of section number thirty (30), in township number twenty (20) south, of range sixty-four (64) west, saving and excepting the right of way of the Denver & Rio Grande Railroad Company, one hundred feet in width, running from north to south through said land; that the plaintiff do have and recover of and from the defendant, John D. Fee, the possession of the premises aforesaid; that he have a writ of possession therefor according to the force, form, and effect of said recovery, and, further, that the plaintiff do have and recover of and from said defendant his costs and charges in and about this proceeding incurred, to be taxed, and that execution may issue therefor.

The defendant, by counsel, excepts to the judgment for possession and for costs of suit entered against defendant herein.

Judgment entered at Pueblo this 13th day of January, A. D. 1890.

Attest: THEODORE A. SLOANE,
Clerk District Court.

And afterward, on, to wit, January 13th, A. D. 1890, the said defendant presented to the clerk of said court his bond upon appeal to the supreme court of the State of Colorado, and the same was duly approved and filed, said appeal bond being in the words and figures following, to wit:

40 Know all men by these presents that we, John D. Fee, George Bell, M. W. Mealy, of the county of Pueblo and State of Colorado, are held and firmly bound unto Jane C. Brown in the

penal sum of three hundred dollars; for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated, at Pueblo, this 11th day of January, in the year of our Lord one thousand eight hundred and ninety.

The condition of the above obligation is such that whereas the said Jane C. Brown did on the 20th day of December, one thousand eight hundred and eighty-nine, at a term of the district court then being holden within and for the county of Pueblo, in the third judicial district of the State of Colorado, obtain a judgment against the above-bounden John D. Fee sustaining the demurrer filed by said Jane C. Brown to the second defense of said Fee set forth in his answer filed in said suit of Brown *v.* Fee, pending in said court, and the said Fee elected to stand by said demurrer and prayed an appeal to the supreme court of the State of Colorado, and the said Jane C. Brown did on said day, in the court aforesaid, obtain a judgment against said Fee for the possession of the S. E. ¼ N. E. ¼ sec. 25, township 20 south, range 65 west, and S. W. ¼ N. W. ¼ sec. 30, township 20 south, range 64 west, all in the county of Pueblo and State of Colorado, and for costs of suit, from which judgments the said John D. Fee has prayed for and obtained an appeal to the supreme court of said State of Colorado:

Now, if the said appellant, John D. Fee, shall duly prosecute *a*
said appeal and shall pay to said Jane C. Brown, appellee,
41 all costs and damages that shall be adjudged to said appellee
on said appeal, and also if said appellant will satisfy and perform the said judgment or order appealed from in case it shall be affirmed and any judgment or order which the supreme court of said State may render or order to be rendered by the said district court, not exceeding in amount or value the original judgment rendered in said district court, and will pay all rents or damages to the said above-described property during the pendency of said appeal, out of the possession of which the said appellee is kept by reason of the said appeal, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOHN D. FEE. [L. S.]
GEORGE BELL. [L. S.]
M. W. MEALEY. [L. S.]

Which said bond was endorsed as follows, to wit:

Appeal bond. In the district court, Pueblo county, Colorado. Jane C. Brown *vs.* John D. Fee.

This appeal bond approved by me and filed in the district court for Pueblo county on this 13th day of January, A. D. 1890.

THEODORE A. SLOANE, *Clerk.*

42 STATE OF COLORADO, } ss:
County of Pueblo, }

I, Theodore A. Sloane, clerk of the district court within and for said county, in the third judicial district of the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record as indicated and directed by præcipe of of defendant's attorney filed; also of the appeal bond approved and filed in a certain cause, lately pending in said court, wherein Jane C. Brown was plaintiff and John D. Fee was defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Pueblo, in said county, this 14th day of January, A. D. 1890.

THEODORE A. SLOANE, *Clerk.*

Transcript costs, $13.40.
Paid by defendant.

43 STATE OF COLORADO, ss:

In the Supreme Court of the State of Colorado, in the January Term, A. D. 1890.

JOHN D. FEE, Appellant, } Appeal from the District Court of the
v. Third Judicial District in and for
JANE C. BROWN, Appellee. } Pueblo County.

Assignment of Errors.

Now comes John D. Fee, by Fred. Betts, his attorney, and says that in the reocrd and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in admitting in evidence over the objections of the defendant (appellant) the patent from the United States to Henry C. Brown, of the date of Dec. 1st, 1876, and in considering the same as an evidence of title for the reas-ns:

1st. That said patent was issued without authority and without any exception in its favor; and,

2nd. Because said patent is void on its face.

Second. The court erred in admitting in evidence over the objections of defendant (appellant) the deeds from Henry C. Brown to Frank Owers and from Frank Owers to Jane C. Brown, the appellee, for the reason that no ground had been laid for the introduction of the same, in that no title to said property had been shown ever to have existed in said Henry C. Brown.

44 Third. The court erred in refusing to admit in evidence the literal exemplification of the records of this General Land Office, under the *sael* of the General Land Office and duly attested by the certificate and signature of the Commissioner thereof, showing that the land in controversy had never been offered at public sale under the provisions of the act of April 24th, 1820, for the reason that the fact that said land had never been offered at public sale under said act was a fact which it was not within the exclusive

jurisdiction of the Land Department to determine, but one which was of record in the General Land Office and which it was the duty of said Land Department to recognize and to act in conformity with.

Fourth. The court erred in refusing to admit in evidence the copies—duly certified under the seal of the General Land Office and the certificate and signature of the Commissioner of the General Land Office—of the letters of the Commissioner of the General Land Office of the dates of May 11th, 1875, and July 19th, 1876, and certificate No. 1728, issued to said Henry C. Brown under date of August 2nd, 1876, by the register of the land office at Pueblo, Colorado, in conformity with the instructions contained in said letters of May 11th, 1875, and July 19th, 1876, for the reasons:

1st. That said certificate No. 1728 and said letters of May 11th, 1875, and July 19th, 1876, became, by a reference thereto contained in said patent, a part of the said patent; and,

2nd. For the reason that said letters and said certificate were admissable in evidence to explain said patent and to show under and by virtue of what law the same was actually issued.

Fifth. The court erred in refusing to admit in evidence the copy of the receipt of the receiver of the land office at Pueblo,
45 Colorado, of the date of August 2nd, 1876, duly certified under the seal of the General Land Office and the certificate and signature of the Commissioner thereof, for the reason that said receipt was admissable for the purposes of explaining under what circumstances said patent of Dec. 1st, 1876, was issued.

Sixth. The court erred in refusing to admit in evidence the copy, duly certified under the seal, certificate, and signature of the clerk and recorder of Pueblo county, of the relinquishment of said land by said Henry C. Brown to the United States, under date of May 20th, 1876, for the reason that said relinquishment is admissable to show under what circumstances said patent of Dec. 1st, 1876, was issued.

Seventh. The court erred in sustaining the demurrer of plaintiff (appellee) to the second defense in defendant's (appellant's) answer in said cause of action filed.

Eighth. The court erred in not deciding that the said patent of Dec. 1st, 1876, was no evidence of title whatsoever, for the reasons that said patent was issued without authority of law and with no exception in its favor, and for the further reason that it is void on its face.

Ninth. The court erred in giving judgment for plaintiff (appellee) in said action for the reason that said land had never been offered at public sale under the provisions of the act of April 24th, 1820, and was not subject to private entry, and for the further reason that the act of June 8th, 1872, did not and does not authorize the sale at private entry of any lands beyond the limits of the
46 territory ceded to the United States by the terms of the treaty of Sept. 30th, 1854, with the Chippewas of Lake Superior, which had not been offered at public sale under the provisions of the act of April 24th, 1820, and for the further reason that the act

of June 8th, 1872, does not authorize the sale at private entry of any lands whatsoever beyond the limits of said ceded territory.

Tenth. The said judgment in this action is contrary to law.

Eleventh. The said judgment in this action is manifestly contrary to the evidence.

Wherefore the said appellant prays that said judgment may be reversed and that he may have a judgment and decree of this court declaring and adjudging said patent of Dec. 1st, 1876, wholly void and of no effect or virtue as an evidence of title to said land.

JOHN D. FEE, *Appellant.*

FRED. BETTS, *His Attorney.*

47 [Endorsed:] No. 2657. In supreme court, State of Colorado. John D. Fee, appellant, *v.* Jane C. Brown, appellee. Transcript of record, bill of exceptions, and assignments of error. Filed in supreme court this 15th day of January, 1890. James A. Miller, clerk.

48 And afterwards and on the 24th day of February, A. D. 1890, came said appellee, by James H. Brown, Esquire, her attorney, and filed herein her joinder in error in words and figures as follows, to wit:

STATE OF COLORADO, *ss:*

In the Supreme Court, to the January Term, A. D. 1890.

JOHN D. FEE, Appellant, *v.* JANE C. BROWN, Appellee. } No. 2657. Appeal from District Court of Pueblo County.

Now comes the said appellee, by James H. Brown, her attorney, and says that there is no error in the record and proceedings, nor in the rendition of judgment by the said district court, as assigned herein, and therefore she prays that the said judgment may be affirmed, and that her costs may be adjudged to her, etc.

JAMES H. BROWN,
Attorney for Appellee.

Endorsed: No. 2657. In supreme court, Colorado. John D. Fee, appellant, *v.* Jane C. Brown, appellee. Joinder in error. Filed in supreme court Feb. 24, 1890. James A. Miller, clerk. James H. Brown, att'y for appellee.

49 And on, to wit, June 6th, A. D. 1892, the same being one of the juridical days of the April, A. D. 1892, term of said court—present, Charles D. Hayt, chief justice; Victor A. Elliott, Joseph C. Helm, justices; F. A. Richardson, bailiff; James A. Miller, clerk—the following further proceedings were had and entered of record, to wit:

JOHN D. FEE, Appellant, v. JANE C. BROWN, Appellee. } Appeal from District Court of Pueblo County.

At this day this cause coming on to be heard as well upon the transcript of proceedings and judgment had in said district court in and for the county of Pueblo as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the jndgment aforesaid of said district court be, and the same is hereby, affirmed and stand- in full force and effect, and that this cause be remanded to said district court for such other and further proceedings according to law as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the court that said appellee do have and recover of and from said appellant her
50 costs in this behalf expended, to be taxed, and that she have execution therefor, and let the opinion of the court filed herein be recorded.

And thereupon and on the same day last aforesaid the opinion of the court herein was filed in the office of the clerk of said supreme court, and is in words and figures as follows, to wit:

51 JOHN D. FEE, Appellant, vs. JANE C. BROWN, Appellee. } No. 2657.

Appeal from district court of Pueblo county.

Ejectment by Jane C. Brown, appellee, against John D. Fee, appellant, to recover possession of certain lands in Pueblo county. Judgment in favor of Mrs. Brown. Appeal by Fee.

The essential facts shown by the pleadings and stipulation are briefly as follows: On September 30th, 1854, the United States concluded a treaty, which, in pursuance of an act of Congress adopted the same year, was proclaimed in January, 1855, with the Chippewa Indians of Lake Superior and the Mississippi, whereby certain of their lands were ceded to the Government. Vol. 10, p. 1109, U. S. Statutes at Large. By the seventh clause of the second article of this treaty the Government agreed to grant by patent eighty acres of land to "each head of a family or single person over twenty-one years of age at the present time of mixed bloods belonging to the Chippewas of Lake Superior." In executing this provision the beneficiaries were identified by the issuance of certificates commonly called "Chippewa half-breed scrip." The certificates were non-assignable and contained the following provision: That "the patent for lands located by virtue thereof shall be issued directly to the scripee, his heirs or assigns." There was no prohibition against

a conveyance by the beneficiary of the patent title when once acquired. The statute of 1854 confined the selection by the
52 beneficiaries to lands within the ceded territory. But there was no provision in any of the certificates issued prior to July 6th, 1868, thus limiting their purchasing power, and the certificates were expressly recognized and received by the officials of the General Land Office as locatable upon any portion of the public domain subject to entry.

In the course of a few years these certificates became an article of trade, and were kept on sale by brokers and bankers. The provision relating to assignments was evaded by procuring from the scripee at the time of purchasing the certificate or scrip two powers of attorney, both executed in blank as to the names of agents and description of land. One power of attorney authorized the location of the scrip in the name of the scripee, and the other authorized the conveyance of the patent title issued to the scripee.

Prior to February 9th, 1867, one Mary Dauphinias received a certificate, "No. 45 D," as a beneficiary under said treaty. This certificate, together with the requisite powers of attorney, came into the hands of one Daniel Witter, who, as attorney-in-fact for Mary Dauphinias, located the land in controversy. On December 29th, 1868, a United States patent therefor issued to said Dauphinias, and under his second power of attorney Witter conveyed the same by deed to Henry C. Brown.

In 1872 Congress, after investigating the abuses connected with the issue and use of the Chippewa half-breed scrip, adopted a special act of Congress authorizing the Secretary of the Interior to permit the purchase of land held by means of these certificates and the completion of entries of claims made thereunder where the parties interested were innocent and were acting in good faith. U. S. Rev. Stats., sec. 2368.

53 In 1874 the supreme court of California declared a patent issued prior to 1872, similar to the one under which Henry C. Brown held title, void on its face because the land patented was outside the ceded territory. In 1873 Brown, having discovered the invalidity of his patent, made application for a new patent, which, upon the certificate of the register reciting his compliance with requirements of the land office, issued December 1st, 1876. Thereafter and before the commencement of this suit Henry C. Brown conveyed the premises by a good and sufficient deed to Jane C. Brown.

In August, 1888, appellant Fee took possession of the premises in controversy and proceeded to make valuable improvements thereon. In September following, having established his residence thereon with the intention of procuring title, he made application in writing in due form to enter such land as a homestead in the proper land office, and tendered all legal fees and commissions due in connection with such applications. When this suit was begun and when trial was had this homestead application was still pending and undetermined before the Land Department.

The original patent to Mary Dauphinias, letters by the Commis-

sioner of the General Land Office showing the action of the Land Department in dealing with Chippewa half-breed scrip and in dealing with land located thereunder, a certificate by the register, and a receipt by the receiver of the land office at Pueblo, together with other evidential documents and instruments, appear *in hæc verba* in the record, but it is deemed unnecessary to set them out in full. The substance thereof, as well as all remaining important facts, sufficiently appear in the opinion.

54 Mr. Justice HELM delivered the opinion of the court:

The patent of 1868, through which Henry C. Brown originally claimed title, was invalid. It was based upon the Chippewa half-breed certificate of scrip issued to Mary Dauphinias. This certificate was given in pursuance of the seventh clause, second article, of the treaty of 1854 with the Chippewa Indians; but this treaty is to be construed in connection with the act of Congress of 1854 by which it was authorized, and that act limited the selection of lands by the beneficiaries named to the territory ceded by the Indians under the treaty; but the territory thus ceded was entirely within the States of Minnesota and Wisconsin. There was, therefore, in 1868, when the Dauphinias certificate was located and the Dauphinias patent issued, no authority of law for locating Chippewa half-breed scrip upon land in Colorado or for patenting such locations. Parker *vs.* Duff, 47 Cal., 554.

Hence it was, as we shall presently see, that after the decision of Parker *vs.* Duff, *supra*, holding such patents void, Brown undertook to avail himself of the benefit of the act of Congress of 1872. He surrendered the original patent, executed a deed of relinquishment, paid the extra sum demanded of $2.50 per acre, and complied with all the other requirements of the Land Department. In 1876 a new patent issued to him for the premises originally located, being the same premises now in controversy. Upon the validity of the latter patent rests the decision of the case.

Appellee's counsel vigorously contends that appellant, being a stranger to the patent and not having in any way connected himself with the title from the Government, is a mere trespasser
55 and not in position to invoke the rule permitting an outstanding title to be shown by defendants in the action of ejectment. It is asserted that appellee's prior possession under the patent of 1876, even if it were void, would prevail in this action as against appellant, whose entry and subsequent acts amount to nothing more than a naked trespass.

Again, it is strenuously insisted on behalf of appellee that even if appellant occupies such a legal status as would enable him to attack the validity of the patent of 1876, that document is not void on its face and therefore must prevail in this action. To show the invalidity of the patent appellant's counsel relies upon the rule that an instrument referred to in a deed is to be considered as incorporated therein. Hence he argues that since the patent mentions a certificate made by the register, showing compliance by Brown with the land office requirements, and since this certificate also refers to

Commissioner's letter "C" of July 19th, 1876, which letter in turn refers to Commissioner's letter of May 11th, 1875, these documents are in contemplation of law incorporated into the patent; and by means of this incorporation it is claimed the invalidity of the patent is made to appear upon its face. The correctness of this broad application of the doctrine of reference is forcibly combatted.

But under the view we shall adopt concerning the scope and effect of the act of Congress of June 8th, 1872, it is unnecessary to discuss or determine either of the foregoing questions. For the purposes of the present decision, we shall assume (without indicating any conclusion thereon) that appellant could defeat the action by showing an outstanding title in the United States, and that the instruments above referred to are to be treated as a part of the patent, without limitation to the particular purpose for which it is contended the reference was made.

56 The validity of the patent of 1876 is challenged on the ground that its issuance was not authorized by law. We are told that neither the act of April 24th, 1820, which was the general statute in force providing for the patenting of Government lands, nor the remedial act of 1872 permitted the issue of this patent. This contention is predicated upon the following grounds: First, that the offering of land at public auction is a condition precedent to its entry or patent under the act of 1820, and that in view of the admitted averment of the answer, coupled with the rejection of evidence, we are bound to regard the land in controversy as never having been "offered." Second, that the act of 1872 was only intended to permit the purchase of land in the ceded territory, and the ceded territory being entirely within the States of Minnesota and Wisconsin, land in Colorado is not within the purview of the act. Third, that the act of 1872 applied only to unpatented claims, and was not intended to give relief where, as in the case at bar, patents had at the time of its adoption actually issued and were outstanding. Fourth, that only "innocent parties in good faith" holding Chippewa "claims" or holding locations thereunder were entitled to the benefit of this statute, and that since Brown, the patentee, must be held to have known the limitation in the act of 1854 confining the location of Chippewa half-breed certificates to the ceded territory, he cannot be regarded in law as an "innocent party" acting "in good faith."

True it is that "unoffered" lands are not subject to private entry under the act of 1820, U. S. Rev. Stats., sec. 2357, and it is admitted that the patent to Brown recites that he had "made full payment" for the land in controversy according to the provisions of that statute. This admission may be literally true. Brown's deposit may have complied with the formal requirements of the act, but

57 the patent recital does not amount to a declaration that the patent issued under this statute alone. On the contrary, the recitation of the patent that the Government, "in consideration of the premises and in conformity with the several acts of Congress in such case made and provided," granted, etc., shows that it also issued under such other acts, if any, as were applicable. If, therefore, the

act of 1872 was pertinent, it may be that this provision of the statute of 1820 was thereby waived as to tracts like the one in dispute.

Counsel for appellant concedes in argument that Brown attempted to invoke the statute of 1872, and that the various land officers were also endeavoring to act thereunder in receiving his money and in issuing to him the patent of 1876. In this concession counsel is undoubtedly correct. We therefore proceed to examine that statute for the purpose of determining whether it does or does not authorize the action of the Land Department in the premises.

It is entitled "An act to perfect certain land titles therein described," and reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized to permit the purchase, with cash or military bounty land warrants, of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September thirtieth, eighteen hundred and fifty-four, at such price per acre as the Secretary of the Interior shall deem equitable and proper, but not at a less price than one dollar and twenty-five cents per acre, and that owners and holders of such claims in good faith be also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned: Provided, that it shall be shown to the satisfaction of the Secretary of the Interior that said claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same."

That this statute relates exclusively to lands taken or to be taken with Chippewa half-breed scrip issued in pursuance of the
58 Chippewa treaty of 1854 cannot be doubted. It is not, strictly speaking, a confirmation of grants previously made. It permits parties in good faith holding these certificates to perfect entries therewith; but in so doing such parties are required to make additional payments in accordance with the act and to comply also with its remaining provisions. As to all other persons included, the substantial effect of the statute is to simply give them a preference by which they are enabled to procure title thereunder for lands previously selected and, to use the statutory phrase, "located with" this scrip. The act is clearly remedial and should receive a liberal interpretation, so as to advance the remedy. In endeavoring to discover its specific purpose we should consider, among other things, the particular mischief which led to its passage and the character of the information possessed by its framers in relation thereto.

Frauds and evasions of law existed in connection with the issue and sale of Chippewa half-breed certificates. So serious had these abuses become that in December, 1871, Congress by resolution called upon the Secretary of the Interior for information touching the subject. Promptly upon receipt of this information the statute of 1872 was adopted. The fourth paragraph of the congressional resolution asked for "a copy of said scrip, the manner of locating the same, whether by the parties to whom it was issued or by others,

whether located upon lands ceded by said tribe, and all decisions of the Department of the Interior in relation to the issuance and location of said scrip." Among other facts of which Congress thus secured knowledgeare the following: That many certificates of this scrip had issued to fictitious persons, and that other extensive and systematic frauds existed in connection therewith; that the
59 Secretary of the Interior had declared a large portion of the scrip void and had ordered all unpatented entries to be cancelled. But Congress was also informed that the Land Department, by means of circulars and letters, had for a long period held that the Chippewa certificates issued in pursuance of the treaty were locatable upon any unoccupied public lands subject to pre-emption, whether outside or inside the ceded territory; that there was nothing in the certificates issued before July 6th, 1868, to indicate that the purchasing power of this scrip was limited to the ceded territory; that prior to February 26th, 1872, six hundred and thirty patents had been issued for land taken with Chippewa half-breed certificates; that one hundred and fifty-six of said six hundred and thirty patents covered lands in California, Colorado, Dakota, and Utah, lands not within any part of the territory ceded by the Indians, and that a total of three hundred and fifty-two related to lands outside the State of Minnesota, to which State counsel for appellant asserts the act of 1872 was limited.

In the light of this knowledge by Congress when the statute was adopted, what are the reasonable inferences concerning its purpose? It appeared to that body that many innocent parties, misled by the action of the Land Department, would be injured through the cancellation of certificates and entries. The remedial statute under consideration was undoubtedly intended to aid such parties, viz., innocent individuals who had attempted or were attempting or about to attempt to procure title to Government lands by means of Chippewa half-breed scrip. The language of the statute is general and sweeping; it contains no words expressly excluding from its purview lands then patented, unoffered lands, or lands outside the ceded territory. Its operation is, so far as the language employed is concerned, wholly unlimited save as to the matter contained in the
60 single proviso, viz., that as a condition precedent to patent thereunder proofs shall be offered satisfying the Secretary of the Interior that the respective claimants are "innocent parties in good faith."

It should be remembered in passing that the exceptions contended for will, if recognized as part of the statute, become the means of overthrowing, not of upholding, the patent, and of course such recognition should, under the circumstances, be coerced by very strong legal considerations. A further suggestion, also worthy of notice, is that the very fact that Congress put in a proviso limiting the scope of the legislation in one particular tends to show that if other limitations had been designed they would have received express mention.

In the disposition of the public lands Congress is omnipotent. It has plenary power to prescribe the conditions upon which Gover-

ment title may be obtained and the procedure in relation thereto. It may donate the land, or it may exact different prices and affix different conditions in connection with the acquisition of title to different tracts. It may repeal, extend, or limit previous enactments at will, provided prior vested rights be not injuriously affected.

We proceed to the further consideration of the law of 1872 with the preliminary suggestion that the word "claims," therein employed, means the scrip or certificates issued to the Chippewa beneficiaries specified in the statute and treaty of 1854. This word does not refer to the act of selecting and segregating land from the public domain under or by means of these certificates. The declarations in the affirmative portion of the law, "lands that have been located with said claims," etc., and in the proviso of the law, "locations made under such claims," avoid all doubt upon this subject.

It will be observed that the congressional inquiry above mentioned expressly asked in relation to the scrip "whether
61 located upon lands ceded by the tribe." And in response, as we have seen, that body was informed that for eleven years at least the Land Department had recognized the location of land with Chippewa scrip outside the ceded territory; also that a large number of locations had been thus made. In view of this inquiry and information, is it nor more reasonable to infer from the silence of the act in this regard that it was the intention to extend the remedial privilege conferred to the claimants of such lands than to infer the contrary? A purpose to deny these claimants the right to perfect their defective titles should and probably would have been affirmatively expressed in plain and unambiguous language.

The foregoing observation applies with equal, if not greater, force to cases where patents had previously issued upon such locations. The fact that the Secretary of the Interior had ordered unpatented entries to be cancelled cannot fairly be said to indicate that the action of Congress extended only to this class of claimants. Congress knew that one hundred and fifty-six patents, one-fourth of the total number, had issued to lands without the ceded territory. The members of that body must be presumed to have known the law; hence they must be presumed to have known that these original patents were void. Why should they deny the favor to the claimants of this class of patented lands and extend it to parties who had merely selected or "located" lands? Individuals claiming through these patents were as much in need of congressional aid as other claimants. The patents being void, so far as the Government title was concerned it was precisely as if they had never issued. Every consideration of justice and fairness suggested at least the equal necessity for giving relief to the owner of a patent acting in good faith. The word "patented" is not used, it is true, but the
62 word "located," which is used, describes not inaptly the real status of these lands. That the Secretary of the Interior understood the same word, as employed in the congressional inquiry, to include patented lands is evidenced by the fact that his report contained, among other things, as we have already seen, "a list of

Chippewa half-breed locations that are patented." While the word "location," when used with reference to land, ordinarily has a different significance, considering the context of the statute, the information possessed by Congress, the construction given by the Secretary of the Interior in his response, and other associated circumstances, we are satisfied that that officer did not err in the meaning he subsequently attributed to the act.

Nor do we find anything in the statute or in the circumstances attending its adoption excluding the view that its remedial operation extended to "unoffered" as well as to "offered" lands. If it be true, as claimed, that the Land Department had permitted parties to locate and patent by means of Chippewa half-breed scrip "unoffered" lands, Congress had or could easily have obtained information of the fact. There was nothing to prevent extending the remedial legislation to the owners of such patented lands, notwithstanding the provisions of the act of 1820 relating to the subject. Congress had the power to waive in this, or in any other given instance, the particular requirement of that act touching the "offering" of lands. We shall decline to recognize this exception from the act of 1872. Besides, the duty of first offering lands at public auction is imposed upon the Land Department. And the assertion of counsel for appellee may be correct that even if such "offering" were required under the act of 1872, the patent authorizes a presumption, conclusive in actions at law, that this antecedent duty was performed.

The contention that Brown could not have been an innocent
63 party, in good faith, within the meaning of the statute of 1872, because he must be held to have known the law of 1854, and therefore have been aware that the land in controversy could not be taken with Chippewa scrip, is substantially answered by the foregoing discussion. Though scrip issued at a later date mentions this limitation, there was nothing on the face of the certificate of Mary Dauphinias in relation thereto; the treaty did not show it; and while ignorance of law is no excuse, as a matter of fact there was much to justify the reliance placed by Brown and others similarly situated upon the prior uniform declarations and rulings of the Land Department touching the subject. These and similar considerations were probably potent in producing the remedial statute. Moreover, in our judgment, the proviso relating to innocence and good faith refers to the mode of issuing or the manner of acquiring the certificate or "claim" on which the entry is based, not to the entry itself. It was in the issue of these certificates that the frauds in contemplation by Congress were mainly perpetrated, and unless the party invoking the statute was in some way connected with such frauds, he should not be denied the benefit of the legislation. Thus the question of innocence and good faith under the statute becomes clearly a question of fact, not of law; and since the determination thereof was lodged exclusively with the Secretary of the Interior, his finding in favor of Brown is conclusive upon the courts.

The act of 1872 is not entirely free from ambiguity. The able and ingenious argument of counsel for appellant receives color of support from its phraseology, coupled with certain circumstances

attending its adoption. But, as indicated by the foregoing discussion, we think counsel advocates too narrow a view touching
64 its scope and effect. We cannot indorse his contention that the Secretary of the Interior misapprehended its purpose and in awarding the patent to Brown acted without authority of law and hence without jurisdiction. The interpretation given by that officer to the act is sustained, as we have seen, by approved rules of statutory construction as well as by strong considerations of fairness and equity.

We shall decline to interfere with the judgment of the court below. It is accordingly affirmed.

65 And on, to wit, June 21st, A. D. 1892, said appellant filed his petition for rehearing in words and figures as follows:

STATE OF COLORADO, *ss:*

In the Supreme Court Thereof.

JOHN D. FEE, Appellant,
v.
JANE C. BROWN, Appellee. } Petition for a Rehearing.

Appeal from the district court of Pueblo county.

Now comes the appellant herein, by his attorney, and petitions this honorable court for a rehearing in the above-entitled cause for the reason that in rendering the opinion and decision heretofore rendered herein the court erred in the following particulars, to wit:

1st. The court erred in failing to consider the question as to whether the lands outside the limits of the ceded territory could be "located" with these "claims" arising under the treaty of Sept. 30th, 1854, within the meaning of the act of 1872 and the act of Dec. 19th, 1854.

2nd. The court erred in failing to consider the question as to whether it was possible within the meaning of these acts of 1872 and Dec. 19th, 1854, to "begin an entry" with Chippewa scrip for lands outside the limits of the ceded territory.

3rd. The court erred in omitting and neglecting to consider the questions raised by these first and second assignments of error and because of the failure to consider said questions, holding that the only thing found in said act by which the patent for said
66 land issued in 1876 could be defeated was found in the "proviso," and holding as a consequence of said errors that the provisions of this proviso would not be allowed to defeat the operations of the act.

4th. The court erred in failing to consider all parts of the act of 1872, the body of the act as well as the proviso, and in basing its construction of the act upon a consideration of the proviso alone.

5th. The court erred in its understanding of the position of counsel for appellant as to what lands the act of 1872 applied and in assuming that the contention of counsel for appellant is that it could not

apply to any lands save these in Minnesota, and in a considerable degree basing their opinion upon this mistaken assumption.

6th. The court erred in failing to consider the question as to whether the act of 1872 could or did apply to any lands, patented or unpatented, which were not within the limits of the ceded territory.

7th. The court erred in holding or, rather, assuming that the question as to whether the land in controversy had ever been offered at public sale was a question of fact which it was within the exclusive jurisdiction of the Land Department to determine.

And because of the foregoing errors on the part of this honorable court in failing to consider the foregoing material points in the rendering of this decision hereinbefore made appellant prays that a rehearing herein may be had in the above cause.

FRED. BETTS,
Att'y for Appellant.

67 [Endorsed:] No. 2657. In the supreme court. John D. Fee *v.* Jane C. Brown. Petition for a rehearing. Filed in supreme court June 21st, 1892. James A. Miller, clerk. Fred. Betts, attorney for appellant.

68 And on, to wit, the thirtieth day of June, A. D. 1892, the following order was entered by said court in the cause as follows:

JOHN D. FEE, Appellant, *v.* JANE C. BROWN, Appellee. } 2657. Appeal from District Court, Pueblo County.

THURSDAY, *June* 30, 1892.

Upon consideration thereof it is ordered by the court that the petition for rehearing herein be, and is hereby, denied.

69 And afterwards and on August 29th, A. D. 1892, said appellant filed in said cause his petition for the allowance of a writ of error from the Supreme Court of the United States; which said petition, the endorsements thereon, and the allowance thereof are in words and figures as follows:

STATE OF COLORADO, *ss:*

In the Supreme Court Thereof.

JOHN D. FEE, Appellant,
v.
JANE C. BROWN, Appellee.

Petition for Writ of Error to the Supreme Court of the United States in the Above-entitled Cause.

To the Honorable Charles D. Hayt, chief justice of said court, at chambers, Denver, Colorado:

Now comes John D. Fee, the above-named appellant, and, conceiving himself aggrieved by the judgment of the said the supreme court of the State of Colorado rendered June 6th, A. D. 1892, in the said case of John D. Fee, appellant, *v.* Jane C. Brown, appellee, and also conceiving himself aggrieved by the refusal of said court on June 30th, A. D. 1892, to vacate said judgment and to grant a rehearing in said cause, respectfully calls your honor's attention to the fact that the said supreme court of the State of Colorado is the highest court of law or equity of the said State in which a decision can be had in the said suit between the said John D. Fee, appellant, and Jane C. Brown, appellee.

70 And said John D. Fee further respectfully calls your honor's attention to the fact in the decision and judgment herein rendered, as hereinbefore set forth, there was drawn in question the construction of several statutes of the United States, and that said decision and judgment was against the title, right, and privilege specially set up and claimed by appellant under said statutes.

And the said John D. Fee therefore respectfully petitions your honor and prays that he may be allowed a writ of error from the supreme court of the State of Colorado aforesaid to the Supreme Court of the United States, in said cause of John D. Fee, appellant, *v.* Jane C. Brown, appellee, from the decision rendered, as provided by law.

FRED. BETTS,
Attorney for Appellant, Pueblo, Colorado.

In the Supreme Court, State of Colorado.

JOHN D. FEE, Appellant,
v.
JANE C. BROWN, Appellee.

The writ of error in the above cause is allowed, and a bond for costs, with good and sufficient sureties, having been given and approved by me, permission to remove the cause to the Supreme

71 Court of the United States is hereby given in accordance

with the prayer of the petitioner herein. Given at chambers this 29th day of August, 1892.

CHARLES D. HAYT,
Chief Justice of the Supreme Court, State of Colorado.

Attest: JAMES A. MILLER, [SEAL.]
Clerk of Sup. Ct., Colo.

72 [Endorsed:] No. —. Petition for allowance of writ of error from Sup. Ct. of United States and order allowing same. Filed in Supreme Court Aug. 29th, 1892. James A. Miller, clerk.

73 And contemporaneously with the filing of his said petition for said writ of error said appellant filed his cost bond with the clerk of the court; which said bond and the approval and endorsements thereon are as follows, to wit:

Know all men by these presents that we, John D. Fee, as principal, and R. H. Dunn and George Bell, as surety, are held and firmly bound unto Jane C. Brown, her heirs, executors, administrators, and assigns, in the penal sum of five hundred dollars ($500.00), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Witness our hands and seals this 25th day of August, A. D. 1892.

The condition of the above obligation is such that whereas the said Jane C. Brown did on the 6th day of June, A. D. one thousand eight hundred and ninety-two, at a term of the supreme court of the State of Colorado, obtain a judgment against the above-bounden John D. Fee, affirming the judgment of the district court of Pueblo county, Colorado, wherein, in a certain case in which Jane C. Brown was plaintiff and said John D. Fee was defendant, said Jane C. Brown did recover from said John D. Fee the possession of the southwest quarter of the northwest quarter of section numbered thirty (30), in township numbered twenty (20) south, of range sixty-four (64) west, and to reverse which said judgment of said supreme court of the State of Colorado, affirming said judgment of the said district court of Pueblo county aforesaid, the said John D. Fee

74 has sued out a writ of error from the Supreme Court of the United States to the supreme court of the State of Colorado; and

Whereas an order has been made by the honorable chief justice of the supreme court of the State of Colorado allowing said writ of error upon the filing of a bond in the sum of five hundred dollars, conditioned for the payment of all costs which may be lawfully assessed against said John D. Fee in the Supreme Court of the United States in said suit:

Now, therefore, if the said John D. Fee shall duly prosecute said writ of error with effect and without delay, and, moreover, pay or cause to be paid all costs to be rendered or adjudged against the said John D. Fee, the said plaintiff in error, in said cause by the

Supreme Court of the United States, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN D. FEE. [SEAL.]
R. H. DUNN. [SEAL.]
GEORGE BELL. [SEAL.]

STATE OF COLORADO, }
—— *County.* }

Personally appeared this day before me, a notary public of Pueblo county and State aforesaid, R. H. Dunn, surety on the foregoing bond, who, being duly sworn, deposes and said that he is seized and possessed in his own right, over and above all his just debts and liabilities, in property not exempt by law from levy and sale under execution, of a clear, unencumbered estate of the value of five hundred dollars within the jurisdiction of the State.

R. H. DUNN.

Subscribed and sworn to before me this 25th day of August, 1892.

[SEAL.] A. C. FOOTE,
75 *Notary Public.*

Comm. expires March 17th, 1894.

STATE OF COLORADO, }
—— *County,* } *ss:*

Personally appeared this day before me, a notary public, George Bell, of Pueblo county and State aforesaid, surety on the foregoing bond, who, being duly sworn, deposed and said that he is seized and possessed in his own right, over and above all his just debts and liabilities, in property not exempt by law from levy and sale under execution, of a clear, unencumbered estate of the value of five hundred dollars, within the jurisdiction of this State.

GEORGE BELL.

Subscribed and sworn to before me this 25th day of August, A. D. 1892.

[SEAL.] A. C. FOOTE,
Notary Public.

My comm. expires March 17th, 1894.

The foregoing bond is approved this 30th day of August, 1892.

CHARLES D. HAYT,
Chief Justice of Colorado.

76 [Endorsed:] No. —. Fee *v.* Brown. Cost bond, $500.00, on writ of error from Supreme Court of U. S. Filed in supreme court August 29th, 1892. James A. Miller, clerk.

77 STATE OF COLORADO, *ss:*

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify the foregoing to be a complete copy of

the transcript of record of proceedings in a certain cause lately pending in the supreme court upon appeal from the judgment of the district court of Pueblo county, wherein John D. Fee was appellant and Jane C. Brown was appellee, together with the assignment of errors, joinder in error, judgment of the court, the opinion of this court, the petition for rehearing and order denying the same, petition for writ of error from Supreme Court of the United States and order endorsed thereon allowing same, the cost bond of said plaintiff in error, and to which record is appended the original writ of error and citation, with acknowledgment of service therein endorsed.

Seal Supreme Court, State of Colorado.

Witness my hand and seal of said supreme court hereto affixed, at Denver, this 31st day of August, A. D. 1892.

JAMES A. MILLER,
Clerk Supreme Court, Colorado.

Endorsed on cover: Case No. 15,151. Colorado supreme court. Term No., 165. John D. Fee, plaintiff in error, *vs.* Henry C. Brown, executor of Jane C. Brown, deceased. Filed September 30th, 1892.

Office Supreme Court U. S.
FILED.
APR 7 1893
JAMES H. McKENNEY,
CLERK.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1892

JOHN D. FEE,
Plaintiff in Error,
vs.
HENRY C. BROWN, EXECUTOR OF THE ESTATE OF JANE C. BROWN, DECEASED,
Defendant in Error.

Error to the Supreme Court of the State of Colorado.

Motion and Brief of Defendant in Error to Dismiss or Affirm.

JAMES H. BROWN,
Attorney for Defendant in Error,
Postoffice Box No. 2373, Denver, Colo.
Office, No. 711–14 People's Bank Building, Denver, Colorado.

C. J. KELLY, Printer, Denver.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1892.

JOHN D. FEE, *Plaintiff in Error,* vs. HENRY C. BROWN, EXECUTOR OF THE ESTATE OF JANE C. BROWN, DECEASED, *Defendant in Error.*	*Error to the Supreme Court of the State of Colorado.*

MOTION TO DISMISS AND AFFIRM.

Now comes the defendant in error, Jane C. Brown, by James H. Brown, Esq., his attorney, and moves this Honorable Court to dismiss the writ of error in the above entitled cause, or that the judgment of the Supreme Court of the State of Colorado be affirmed, and as grounds therefor alleges that—

First—No Federal question is involved, because the decision of the Supreme Court of the State of Colorado was not against the validity of any Federal statute or any title, right, privilege or immunity or authority exercised thereunder; but, on the contrary, sustained the validity of a United States patent to the land in controversy.

Second—Because it is manifest the writ of error is taken for delay only, and that the question on which the jurisdiction of this Honorable Court depends, is so frivolous as not to need further argument.

James H. Brown

Attorney for Defendant in Error, Henry C. Brown, Ex'r Estate of Jane C. Brown, deceased.

THE UNITED STATES OF AMERICA. } ss.

IN

The Supreme Court

OF THE

United States.

OCTOBER TERM, A. D. 1892.

JOHN D. FEE,
Plaintiff in Error,
vs.
HENRY C. BROWN, EXECUTOR OF THE ESTATE OF JANE C. BROWN, DECEASED,
Defendant in Error.

Brief of Defendant in Error on Motion to Dismiss or Affirm.

This was an action in ejectment, commenced originally in the District Court of Pueblo County, Colorado, wherein defendant in error, Jane C. Brown, was the plaintiff, and plaintiff in error, John D. Fee, was the defendant.

The entire controversy is over the validity of the United States patent issued to Henry C. Brown, the remote grantor of defendant in error, Jane C. Brown, conveying the premises in controversy, issued December 1, 1876. The case was decided on the pleadings.

The complaint of defendant in error, Brown, in conformity with the Civil Code, alleged, among other things, that she was seized in fee simple absolute, and possessed of and entitled to immediate possession of the land in controversy long prior to the month of September, 1888. Fee's answer attacked the patent, setting up the proceedings preliminary to the issuance of the patent. The allegations were that on or about August 31, 1888, Fee was qualified to enter public land under the homestead laws.

That the land in controversy was public land subject to entry under the homestead laws.

That on or about August 31, Fee went on the land and made improvements.

That on September 4, 1888, Fee settled upon and established residence upon the land, with intention of entering same as a homestead.

That on September 12, 1888, Fee made application in writing to enter land as a homestead, to the Registrar of the United States Land Office at Pueblo, Colorado, and tendered all fees and commissions due to the Receiver thereof.

That said homestead application, at time of filing answer, *was pending and still undetermined in the land department.*

That since September 12, 1888, he has resided

upon, holding, occupying, etc., said lands, under homestead laws, *as aforesaid.*

That February 9, 1867, the Commissioner of Indian Affairs, under Treaty of September 30, 1854, between the United States and the Chippewas of Lake Superior and the Mississippi, issued to Mary Dauphinais, a certificate showing she was a beneficiary under the seventh clause of the second article of said treaty.

That on February 9, 1867, Daniel Witter, as attorney in fact of Mary Dauphinais, located the land in controversy in her name.

That such location was made for the benefit of Henry C. Brown.

That December 29, 1868, patent therefor was issued to Mary Dauphinais, setting forth the patent in full.

That January 10, 1867, said Dauphinais executed purported power of attorney authorizing conveyance of said land.

That, as Fee is informed, said letter and the letter authorizing location of the land, were executed in blank.

That there is nothing to show before whom powers of attorney were acknowledged, or that notary had authority to take acknowledgments. That Witter, acting under said pretended powers, conveyed land by deed to Henry C. Brown, January 25, 1869.

That about May 11, 1875, said Dauphinais' patent was held for cancellation, and land officers at Pueblo, Colorado, received from Commissioner of General Land Office a letter relating to the land in controversy, which states that Secretary of the

Interior has decided that he is authorized to perfect titles held invalid by decision of Supreme Court of California (Parker vs. Duff, 47 Cal., 554, wherein patent same as Dauphinais' patent here, is held void as unauthorized by treaty), under act approved June 8, 1872.

That act provides "That the Secretary of the Interior be, and he is hereby authorized, to permit the purchase, with cash, or military bounty land warrants, of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September 30th, 1854, at such price per acre as the Secretary of the Interior shall deem equitable and proper, but not at a less price than $1.25 per acre, and that owners and holders of such claims in good faith be also permitted to complete their entries, and to perfect their titles under such claims, upon compliance with the terms above mentioned; *Provided*, That it shall be shown to the satisfaction of the Secretary of the Interior that such claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same. Approved, June 8, 1872." (17 U. S. Sts., 340.)

The letter then directs the permission to purchase land in controversy, on paying $2.50 per acre, and complying with certain formalities, including a deed of relinquishment from Brown.

That May 20, 1875, patentee Brown executed said deed of relinquishment, which was recorded and is set forth in full in the answer.

That before January 19, 1876, patentee Brown complied with requirements of Secretary of Interior referred to in said Commissioner's letter, and made application to purchase, land in controversy, under act of Congress, June 8, 1872.

That about July 19, 1876, said Dauphinais' patent was canceled, and Commissioner of General Land Office wrote to land officers at Pueblo, a letter set out in full, stating that Secretary of the Interior had sustained the decision of the General Land Office, declaring patentee Brown entitled to purchase land, and providing for red ink reference on face of certificate; that patentee Brown, under said instructions, made private cash entry of land, under act June 8, 1872.

That certificate mentioned in letter of July 19, 1876, contained recital that patentee Brown had made full payment for land as required by law, and bore across its face red ink endorsement referring to instructions of a letter of July 19, 1876, and also contained the Receiver's receipt, and red ink endorsement that it was private entry, under instructions last aforesaid.

States the endorsements on said Receiver's receipt, refers to before-mentioned letters of instruction.

That Receiver's receipt was recorded August 2, 1876, with Recorder of Pueblo County, Colorado, and the endorsements thereon.

That said Certificate No. 1728, deposited in General Land Office, and patent for land in controversy, issued to patentee Henry C. Brown.

That act of June 8, 1872, doesn't authorize patent for lands situated outside of territory ceded to the United States by treaty of September 30, 1854.

That none of said lands are within Colorado.

That land in controversy was never offered at public sale, to the highest bidder, under act of Con-

gress approved April 24, 1820, and had never been subject to purchase at private entry.

That said last patent to patentee Brown refers to said Certificate No. 1728, which recites that "The United States of America, in consideration of the premises, and *in conformity with the several acts of Congress*, in such case made and provided, have given and granted, and by these presents do give and grant unto the said Henry C. Brown and to his heirs, the said tracts above described."

That said patent, unintelligible without reference to said certificate and letters of July 19, 1876, and May 11, 1875, and that same are part of patent.

That defendant in error, Jane C. Brown, acquired title by mesne conveyances to land in controversy, from said patentee, Henry C. Brown.

That neither receipt nor patent passed title, but were issued without authority of law, and void on their face, and "*that the title to the same is still in the United States, and that said lands are public lands, subject to homestead entry under the laws of the United States hereinbefore set forth.*"

To this answer the defendant in error, Jane C. Brown, demurred, for insufficiency. This demurrer was sustained. As Fee had set up in this answer everything that he expected to prove on the trial, final judgment was, by stipulation, entered in favor of defendant in error, Jane C. Brown, and *the validity* of *the patent from the United States* to Henry C. Brown, issued under act of Congress of June 8, 1872, *was sustained.* Fee prosecuted an appeal from this decision to the Supreme Court of the State of Colorado. By an opinion handed down June 6, 1892, reported in full at pages 340 to 344 of

the 30th Pacific Reporter, the judgment of the Court below, in favor of Brown and *sustaining the validity of the* United States *patent, was affirmed.* To reverse this judgment, plaintiff in error Fee has sued out this writ of error to the Supreme Court of the State of Colorado. Since the issuance of the writ, and prior to filing this motion, the death of the defendant in error, Jane C. Brown, being suggested, Henry C. Brown, her executor, was substituted. Jurisdiction is claimed for this Court over the controversy, under Section 709 of the Revised Statutes:

"The rule is settled that, to give this Court jurisdiction of a writ of error to a State Court, it must *appear affirmatively*, (1) not only that a Federal question was presented for a decision by the highest Court of the State having jurisdiction, (2) but that its decision was necessary to the determination of the cause, and (3) that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

Cook Co. vs. C. & C. Canal Co., 138 U. S., 635, 651.

A "Federal question," above referred to, is not presented within the authorities, unless the decision is *against the right* claimed under the Federal legislation, for the language of the statute is that the decision must be "*against their validity*," or against the validity of the title, right, privilege or immunity claimed thereunder.

That this is not such a case is clearly apparent from the assignments of error on which the cause was determined in the Supreme Court of Colorado, viz.: that the District Court of Pueblo County, Colorado, erred—

1. In admitting in evidence, over Fee's objections, the patent from the United States to Henry C. Brown, for the reason (1st) that said patent *was issued without authority*, and without any exceptions in its favor; and (2d) because said patent is void on its face.

2. In admitting in evidence, over Fee's objection, certain title deeds, constituting the chain of title from the patentee, Henry C. Brown, to plaintiff in error, Jane C. Brown, for the reason that no evidence had been produced showing any title in said Henry C. Brown.

3. In refusing to admit in evidence the literal exemplification of the records of the General Land Office, showing that the land in controversy had never been offered at public sale, under the act of April 24, 1820.

4. In not admitting in evidence the copies of letters of the Commissioner of the General Land Office, of certain dates, and Certificate No. 1728, issued to Henry C. Brown by the Registrar of the Pueblo Land Office, in Colorado, under the instructions contained in said Commissioner's letters, because (1) said certificate and said letters became, by the reference contained in said patent, a part of the same, and (2) for the reason that they were admissible in evidence to explain said patent and to show under what law it was issued.

5. In refusing to admit copy of the Receiver's receipt and the certificate and signature of the Commissioner of the General Land Office, to explain under what circumstances said patent was issued.

6. In refusing to admit in evidence the copy

of the relinquishment of said land by Henry C. Brown to the United States, to show under what circumstances said patent was issued.

7. In sustaining Brown's demurrer to the second defense of Fee's answer.

8. In not deciding that said patent was no evidence of title, for the same reasons stated under the first assignment of error.

9. In giving judgment for plaintiff Brown, because said land had never been offered at public sale under the act of April, 1820, and was not subject to private entry, and because the act of June 8, 1872, did not authorize the sale at private entry of any lands beyond the limits of the territory ceded to the United States by the terms of the treaty of September 30, 1854, with the Chippewas of Lake Superior and the Mississippi, which had not been offered at public sale under the act of April 24, 1840, and, also, because the act of June 8, 1872, did not authorize the sale at private entry of any lands whatsoever beyond the limits of said ceded territory.

10. In that the judgment was contrary to law.

11. In that the judgment was contrary to the evidence.

The errors assigned in this Court are:

I. That the act approved June 6, 1872, entitled an "Act perfecting certain land titles therein described," did not permit the purchase, with cash or military bounty-land warrants of any lands located with claims arising under the seventh clause of the second article of the treaty of September 30, 1854, which lay outside of the limits of the territory ceded by the Chippewa Indians of Lake

Superior and the Mississippi to the United States by said treaty of September 30, 1854.

II. That said act of June 8, 1872, applied to such lands as lay within the limits of the territory ceded by the Chippewas under the treaty of September 30, 1854, to the United States, and as had been located in good faith with claims arising under the seventh clause of the second article of said treaty by innocent holders of the same, and for which patent had not yet issued, and to no others.

III. That neither the act of April 24, 1820, nor any other act of Congress whatsoever, permitted the purchase at private entry of the land in controversy before it had been offered at public sale.

IV. That the Land Department had no jurisdiction to determine that the land in controversy had been offered at public sale, when, as a matter of fact, said land had never been offered, and the records of said Land Department so showed. And said land having, as a matter of fact, never been offered at public sale, there is no presumption of there having been so offered that will sustain the patent for said land to Henry C. Brown, of December 1, 1876, under the act of April 24, 1820.

V. That the patent to said land of December 1, 1876, issued to Henry C. Brown under the act of June 8, 1872, was issued without authority and is void on its face, and that the land in controversy is public land, subject to entry under the homestead laws of the United States, and that said John D. Fee was rightfully holding possession of said land under said homestead laws.

It will be observed that all of these assignments of error, both in this Court and in the Supreme Court below, are directed to *the attack and defeat* of the United States patent issued to Henry C. Brown for the lands in controversy. No one of these assignments of error *directly invokes the benefit or protection* of any Federal legislation or authority or right thereunder, personal or pertaining to the plaintiff in error, Fee. They are all directed to attacking and defeating a title given by Federal law, viz., the United States patent, conveying the land in controversy to the defendant in error, as the remote alienee and grantee of the patentee therein, Henry C. Brown.

The opinion of the Supreme Court of the State of Colorado also shows that there was no Federal question involved. The Court *construes* but *does not deny the validity or legality* of the act of Congress of June 8, 1872.

The Supreme Court of Colorado thus stated the points in controversy:

The *validity* of the patent of 1876 *is challenged* on the ground that its issuance was not authorized by law. We are told that neither the act of April 24, 1820, which was the general statute in force providing for the patenting of government lands, nor the remedial act of 1872, permitted the issue of this patent. This contention is predicated upon the following grounds: *First*—That the offering of land at public auction is a condition precedent to its entry or patent under the act of 1820, and that, in view of the admitted averment of the answer, coupled with the rejection of evidence, we are bound to regard the land in controversy as never having been "offered." *Second*—That the act of 1872 was only intended to permit the purchase of land in the ceded territory; and the ceded territory

being entirely within the States of Minnesota and Wisconsin, land in Colorado is not within the purview of the act. *Third*—That the act of 1872 applied only to unpatented claims, and was not intended to give relief where, as in the case at bar, patents had, at the time of its adoption, actually issued, and were outstanding. *Fourth*—That only "innocent parties in good faith" holding Chippewa "claims," or holding locations thereunder, were entitled to the benefit of this statute, and that, since Brown, the patentee, must be held to have known the limitation in the act of 1854, confining the location of Chippewa half-breed certificates to the ceded territory, he cannot be regarded in law as an "innocent party," acting "in good faith."

Brown vs. Fee, —— Colo., ——; s. c., 30 Pac., 340, 344.

The opinion then discusses these objections, and *sustains the validity* of the patent.

From the foregoing statement of facts, it is clearly apparent that no decision has been made by the Supreme Court of the State of Colorado against a right, title, privilege or immunity claimed and personal to the plaintiff in error, Fee, thereunder, but that plaintiff in error, Fee, is seeking to review a decision of the Supreme Court of the State of Colorado, which sustained the validity of a United States patent, issued under the act of Congress of June 8, 1872, aforesaid. This is not sufficient to give this Court jurisdiction.

Where an attempt was made by mandamus to compel the Auditor and Comptroller to audit and allow a claim for mileage on the ground that the statute so plainly provided therefor as to admit of no construction, this Court held that it had no jurisdiction, upon the ground that the validity of an authority exercised of the United States was drawn

in question in such a way as to give it jurisdiction. This Honorable Court there laid down the rule as follows:

"We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

Perry vs. Kings Co., 141 U. S., 668, 673.

Where it was sought to review by writ of error the convictions under three judgments for unlawful cohabitation, under the Act of Congress of March 22nd, 1882, the Court denied that there was jurisdiction, and said:

"The validity of the existence of the Court, and its jurisdiction over the crime named in the indictments and over the person of the defendant, are not drawn in question. All that is drawn in question is whether there is or is not error in the administration of the statute. The contention of the plaintiff in error would allow a writ of error from this Court in every criminal case in a territory where the prosecution is based on a statute of the United States. * * * From the fact that a given criminal case involves the construction of a statute of the United States it does not follow that the validity of an authority exercised under the United States is drawn in question."

Snow vs. United States, 118 U. S., 346, 353.

"In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or

authority is denied, and the denial forms the subject of direct inquiry."

U. S. vs. Lynch, 137 U. S., 280–285.

So where it was sought to review the judgment of the District of Columbia in an action brought by a property owner against a railroad company for unlawful and abusive exercise of statutory authority given by the United States to the railroad company, this Court said:

"*Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question but not otherwise*" (p. 224). The validity of a statute, as these words are used in this Act of Congress, referred to *the power* of Congress to *pass the particular statute at all*, and not to mere judicial construction as contradistinguished from a denial of the legislative power (p. 226). "And it was held this Court had no jurisdiction." Balt. & Pot. Rd. Co. vs. Hopkins, 130 U. S., 210, 224, 226.

So where the Land Commissioner was held by the State Court to have had no authority to vacate an entry, and that any order that he might have made did not affect the rights of the party making the entry, the same rule was laid down. It was said that such decision was not a decision *against a title* specially set up or claimed under an authority exercised under the United States, nor against the validity of such an authority.

Cook County vs. C. & C. Canal Co., 138 U. S., 635, 652–655.

In this case, the entire opinion of the Supreme Court of Colorado is nothing more than a construction of the act of Congress of June 8, 1872,

refuting the attacks upon and sustaining the validity of the United States patent. This Court has made the clear distinction that a Federal question does not exist, giving it jurisdiction where the construction of the statute is had, but no decision is actually or necessarily made against its validity.

B. & P. Rd. Co. vs. Hopkins, 130 U. S., 210–222–225.

The only statement in the entire record appearing to have even the colorable semblance of a federal question about it, is the fifth assignment of error, which claims that the patent issued to Henry C. Brown, under the act of June, 8, 1872, "was issued without authority and is void on its face, and *that the land in controversy is public land*, subject to entry under the homestead laws of the United States, and that the said John D. Fee *was lawfully holding the right of possession to said lands under said homestead laws*."

This is not sufficient to give the Court jurisdiction. A patent for the land cannot be outstanding, and the land also be government land and subject to entry, and at the same time *lawfully in the possession* of Fee under the homestead laws. This is as self-evident as the law of physics that two bodies can not occupy the same space at the same time, or the rule of law, that there cannot be an express and implied contract, between the same parties, at the same time, relating to the same subject matter.

Further, the record does not bear out the last portion of the assignment of error that Fee "was lawfully holding the right of possession to said lands under said homestead laws." His answer

alleges "that the title to the same is still in the United States and that said lands are public lands, subject to the homestead entry under the laws of the United States," and also that "*the application is now pending and still undetermined in the Land Department of the United States*" (*i. e.*, at the time of filing his answer in the *nisi prius* Court, in Pueblo County, Colorado). Nowhere does he allege or show that his actions can possibly constitute, as he alleges in his assignment of error, a "*lawful*" homestead entry.

All that can be said of these allegations in the record is that they amount only to a *colorable* claim or *mere assertion* of a right—*i. e.*, the right to homestead entry on the land in controversy.

This Court has repeatedly ruled, that it will investigate the record and decide for itself "whether the right in issue" is a right guaranteed by federal legislation, of which the party is being deprived. The mere assertion of a claim or right, which on investigation appears not to be well founded, will not give this Court jurisdiction.

So in a suit to recover mineral lands on the Pacific Coast, with mines therein, an allegation of record, of prior possession of the land for the purpose of taking out the minerals, without an allegation that such possession is had under the authority or by some treaty or statute of the United States, does not give this Court jurisdiction to re-examine the case. Nor has the Court jurisdiction where the decision below is that, as a matter of fact, no such license exists.

Boggs vs. Mining Co., 3 Wal., 304, 309, 310.

And so it is said in determining the question of

jurisdiction, where it is claimed under the clause against impairing the obligation of contract:

"It must be made to appear that there was a legal contract, subject to impairment, and if the protection of a constitutional provision of depriving a person of his property without due process of law, is claimed, it should appear that the person has a property in the particular thing of which he is alleged to be deprived. And so a contract between New Orleans and the Water Company having been held to be *ultra vires*, it was said that there was no contract which could be impaired, or the existence of such property right as there could be an unlawful deprivation of by legislation disregarding such contract, and therefore, that this Court had no jurisdiction to review a judgment involving such questions."

New Orleans vs. N. O. W. Wks. Co., 142 U. S., 79, 92, 93.

"Hence, where a party claims authority under an order of a Court of the United States, which when rightly viewed, does not purport to confer any authority upon him, the writ will be dismissed. The 25th Section of the Judiciary Act does not give jurisdiction to this Court in cases of decisions by the Courts of a State *against mere assertions of an exercise of authority* under the United States."

This was an assertion of title to money received from the sale of cotton captured for breach of blockade, and released by order of the United States Court.

Millingar vs. Hartupee, 6 Wal., 258, 261, 262.

Again, the patent which was attacked was issued December 1, 1876. Fee's alleged homestead entry was made September 12, 1888. The patent, therefore, which Fee attacks, is twelve years prior, in point of time, to the making of Fee's alleged homestead entry.

This Court has said that, "The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity, or even impropriety, in the process by which the patent is procured."

U. S. vs. Marshall S. Mng. Co., 129 U. S., 579, 589.

"Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, *settled upon public land and made improvements thereon.* * * * There has been, in this respect, in the whole legislation of the country, a consistent observance of the rules of natural right and justice."

Rector vs. Gibbon, 111 U. S. Reports, 276, 284.

The act of June 8th, 1872, authorizing the perfection of titles, and under which the preliminary proceedings show that the patent attacked, was issued, provided, that the Secretary of the Interior should be satisfied, that the claims be held, and "locations made *in good faith and by innocent parties.*"

Of this act, in relation to this same patent, it has been said:

"In any case of controversy between claimants under the act, the decision of the Secretary as to the merits of their respective demands is final and conclusive, within the authority of adjudged cases."

Pugsley vs. Brown, 35 Fed. R., 688, 690.

The patent, therefore, having been issued in good faith, it must be presumed that there was

some kind of a possession or settlement on the land, prior, in point of time, to its date of issuance, and about twelve (12) years prior to the attempted entry by Fee. Under such circumstances, the patent, although void (which is denied), appropriated the land, as against Fee. In such cases this Court has said:

"The title of the respondent to the particular tract included in his patent was complete *before that of the appellants* commenced. It is not doubted that *a patent appropriates land.* Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held *conclusive against all* those *whose rights did not commence previous to its emanation.* Courts of equity have considered an entry as the commencement of title, and have sustained a valid entry, if issued after such valid entry was made. But they have gone no farther. *They have never sustained an entry made after the date of the patent. They have always rejected such claims.* The reason is obvious. A patent appropriates the land it covers; and that land, *being no longer vacant, is no longer subject to location. If the patent has been issued irregularly, the Government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself.*"

Hoofnagle vs. Anderson, 7 Wheat., 212, 214, 215.

"A patent appropriates land called for, and is conclusive against rights subsequently acquired."

Rush vs. Ware, 15 Pet., 93, 107.

Curle vs. Barrei, 2 Sneed (34 Tenn.), 62, 66.

If any other rule was to prevail, there would be continual bloodshed and strife between rival claimants for the possession of public lands, or

those about the title to which a quibble could be raised.

Land is not subject to entry by a claimant, although the patent therefor is void as issued *without authority of law*. The patent is of such dignity that it must first be canceled by *judicial proceedings*. After patent has once issued, although *without authority of law*, the Land Department cannot reconsider its action and entertain a subsequent entry.

"A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, *until it is set aside or annulled by some judicial tribunal.* * * * Patents are sometimes issued unadvisedly or *by mistake, where the officer has no authority in law to grant them*, or where another party has a higher equity and should have received the patent. * * * The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved for sale by law, such patent is void for want of authority. *But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a Court.*"

United States vs. Stone, 2 Wall, 525, 535.

"'If any lawful reason exists,' said the Secretary in his communication to the Commissioner, 'why the patent should be canceled or annulled, such as fraud on the part of the grantee, *or mistake or misconstruction of the law on the part of your office*, the appropriate remedy is by a bill in chancery and an action may be maintained by the United States or any contesting claimant; but *you are not authorized to reconsider the facts on which a patent was issued, or to recall or rescind it, or to issue one to another party for the same tract.*"

Wright vs. Roseberry, 121 U. S., 488, 516, 517.

The officials of the Land Department, which is a branch of the Executive Department of the National Government, are conclusively bound by this construction of the law. Such, therefore, is the practice in the Federal Land Office. See ruling of the Secretary of the Interior in case of *Bucknam vs. Western Pacific Railroad Company*, refusing to entertain an entry on land while a void patent therefor is outstanding.

1 Copp's Public Land Laws (1882), 328.

In this connection, while it is not in evidence in this case, it may perhaps be stated without any impropriety, that while this case was pending on appeal in the Supreme Court of the State of Colorado, and before the decision thereof, the General Land Office, without any knowledge or appearance by defendant in error in that behalf, in application of the foregoing rules, very properly denied Fee's application to homestead the land in controversy. And so, where the claimant's title had its inception subsequent in point of time to the issuance of United States patent, which he sought to defeat by proof of the proceedings had in the Land Office, which were preliminary to the issuance of the patent, this Court ruled that the admission in evidence of such proceedings was erroneous, and in disposing of the right of the claimant to attack the patent based on *an entry subsequent* to the patent attacked, said:

"According to the doctrine thus expressed and the cases cited in its support, and there are none in conflict with it, there can be no doubt that *the Court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity*. The judgment of the Depart-

ment upon their sufficiency was not, as already stated, open to contestation. If, in issuing a patent, its officers took *mistaken views of the laws*, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a Court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a Court of equity for relief. And even there *his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent, and he must possess such equities as will control the legal title in the patentee's hands. * * * It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it.* If the Government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

Smelting Co. vs. Kemp, 104 U. S., 636, 647.

The equity which will enable a party to aver that his rights are injuriously affected by the existence of the patent, must be one that is *prior, in point of time,* to the inception of such patent title.

Steele vs. Smelting Co., 106 U. S., 447.

Bear vs. Luse, 6 Sawyer C. Ct., 148, 155.

Curle vs. Barrei, 2 Sneed (34 Tenn.), 62, 66.

Thompson vs. Thompson, 52 Cal., 154, 157.

Boggs vs. Merced M. Co., 14 Cal., 279, 362.

Therefore, the assertion by Fee, of a lawful possession by his attempted homestead entry, does not give this Court jurisdiction, because, on examining the record, it appears (1) that this right is but the mere assertion of a claim which is, in truth and in fact, without foundation, and (2) the patent to Brown having been issued nearly twelve years prior, in point of time, to the alleged home-

stead entry of Fee, and the powers of the Land Officers being merely ministerial while the setting aside of a patent is a judicial act, which the Land Officers have no authority to do, since one Land Officer cannot review the acts of his predecessor, it must be said that the alleged attempt of Fee to make a homestead entry was, within the decisions of this Court, null and void and no Federal question is involved of which this Court is authorized to take cognizance.

Therefore, since the United States patent, which was issued to Henry C. Brown on December 1, 1876, was, by the decision of the Supreme Court of the State of Colorado, sustained and held to be valid, and the alleged homestead entry of Fee is but the *mere assertion* and *claim* of a right given by the Federal legislation, which, upon examination, appears, in truth and in fact, to be unfounded, and is only invoked and relied upon, to obtain a status to support an attempt to overthrow a prior patent for the same land, there is no Federal question involved in this case and this Court is without jurisdiction.

Defendant in error therefore respectfully submits that this writ of error should be dismissed or the judgment affirmed.

Most respectfully submitted,

JAMES H. BROWN,
Attorney for Defendant in Error,
Postoffice Box No. 2373, Denver, Colo.

Office, No. 711-14 People's Bank Building, Denver, Colorado.

WASHINGTON, D. C., March __, 1893.

I hereby acknowledge service upon me at my office in the City of Washington aforesaid, on the day aforesaid, of a copy of the foregoing printed motion to dismisss and argument of defendant in error in support thereof.

Attorney for Plaintiff in Error, John D. Fee.

MAR 5 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN D. FEE,
PLAINTIFF IN ERROR,

v.

HENRY C. BROWN, EXECUTOR OF JANE C. BROWN, DECEASED,
DEFENDANT IN ERROR.

165

BRIEF OF PLAINTIFF IN ERROR.

J. M. VALE,
Attorney for Plaintiff in Error.

C. C. CLEMENTS,
FRED. BETTS,
Of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

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v.

HENRY C. BROWN, EXECUTOR OF JANE C. BROWN, DECEASED,
DEFENDANT IN ERROR.

No. 165.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case involves the right of plaintiff in error to take as his homestead certain lands in the State of Colorado, being the southwest quarter of the northwest quarter of section numbered thirty, in township numbered twenty south, of range sixty-four west (S.W. ¼ of N.W. ¼ of Section 30, T. 20 S., of R. 64 W.), claimed to be public lands of the United States subject to homestead entry under the laws of the United States.

Plaintiff in error, a qualified entryman, settled upon the said land on the 12th day of September, 1888, and on the

same date he made application to the register of the United States land office at Pueblo, Colorado, in writing, in due form, to enter said land as his homestead under the laws of the United States, and tendered to the receiver of said land office all legal fees and commissions due on making said application; this application is now, and was at the time the action herein was commenced, undetermined by the officers of the United States having control of the sale and disposition of the public lands of the United States. Plaintiff in error has resided on the said land ever since his settlement thereon on the 12th day of September, 1888, and was residing thereon when the issues arising in this action were joined.

On the 8th day of May, A. D. 1889, defendant in error instituted suit in ejectment against the plaintiff in error, in the district court of Arapahoe county, Colorado, alleging in his complaint that on the 6th day of April, A. D. 1889, and ever since July 7, 1879, the defendant in error was seized in fee simple absolute and possessed of the land involved in this suit, and that while so seized the plaintiff in error, on or about April 7, 1889, and without any right or title, entered into possession of said premises and ousted and ejected the defendant in error therefrom. (Record, p. 6.)

In due course, following a change of venue to Pueblo county, Colorado, answer was filed by plaintiff in error denying the seisin of defendant in error in and to the land, the subject of this action, denying that defendant in error was ever possessed of said land or entitled to the possession of said land, denying the possession of plaintiff in error without right and the ouster of defendant in error by plaintiff in error, and denying the unlawful withholding of the possession of said land by plaintiff in error against right.

The facts further appear from the answer of plaintiff in error admitted to be true, to be as follows:

The defendant in error claims the land, the subject of this action, and the right to immediate possession thereof by virtue of an alleged location thereon of a certain Chippewa certificate numbered 45-D, which had been issued to Mary Dauphinais prior to the 9th day of February, A. D. 1867, by the Commissioner of Indian Affairs under and by virtue of the treaty of September 30, 1854, between the United States and the Chippewas of Lake Superior and the Mississippi (10 U. S. Stats. 1110), which certificate identified said Mary Dauphinais as being one of the persons entitled to eighty acres of land under the provisions of the seventh clause of the second article of said treaty. The certificate named provided that any sale, transfer, mortgage, assignment, or pledge of the same, or any right accruing thereunder, would not be recognized as valid by the United States, and that the patent for lands located by virtue thereof should be issued directly to said Mary Dauphinais, the reservee named therein, or to her heirs, and should in no wise inure to the benefit of any other person or persons whatsoever, the object of the certificate being, as per recitals therein, the identification of Mary Dauphinais only.

It is alleged by plaintiff in error on information and belief (see p. 12 of Record), and has become an admitted fact in this case, that the signature of Mary Dauphinais was obtained to certain paper writings in blank which, when filled up, purported to authorize one Daniel Witter, as the attorney in fact for Mary Dauphinais, to locate the said certificate 45-D for her, and to sell and convey the lands so located. A paper writing purporting to bear the signature of Mary Dauphinais, bearing date January 10, A. D. 1867, and purporting to be acknowledged before one

James Chapman in La Pointe, Wisconsin, pretends to empower one Daniel Witter, as the attorney in fact of Mary Dauphinais, to sell the land involved in this suit.

On the 9th day of February, 1867, Daniel Witter, claiming to be acting as the duly authorized attorney in fact of Mary Dauphinais, located the said certificate upon the land herein involved. It is alleged on information and belief, and has become an admitted fact in this case, that Mary Dauphinais knew nothing of the location of said land, and that the location was made by Daniel Witter at the request of and for the benefit of one Henry C. Brown (see p. 10 of Record).

It is alleged by the plaintiff in error, and has become an admitted fact in this case, that there was affixed to the certificate of acknowledgment by James Chapman, the notary public before whom the alleged power of attorney to sell, dated January 10, 1867, purports to have been acknowledged, no certificate by the clerk of a court of record of the city, county, or district wherein the said Chapman then resided, under the seal of such court, and no certificate of any officer whomsoever showing that said James Chapman was, on the 10th day of January, 1867, or at any other time, a duly qualified and acting notary public in and for said county of La Pointe, in the State of Wisconsin, or that he had any authority whatsoever, by the laws of the State of Wisconsin, to take and certify said acknowledgment, or that the signature to said acknowledgment was the true signature of said James Chapman, as required by the statute in such cases made and provided, and no copy of the notarial commission of said James Chapman, certified to by the secretary of state of the State of Wisconsin, under the seal of the State of Wisconsin, was ever recorded in the office of the clerk and recorder of the county of Pueblo, in the State of Colorado,

as required by the statute in such case made and provided.

On the 29th day of December, 1868, a patent was issued by the United States purporting to have been issued in due form of law, covering the lands in controversy in this action to Mary Dauphinais.

On the 25th day of January, A. D. 1869, Daniel Witter, claiming to act under and by virtue of the paper writing, bearing date January 10, 1867, purporting to be a power of attorney thereunto him authorizing, pretended to convey the said land by deed of general warranty to Henry C. Brown. It is alleged by plaintiff in error, and has become an admitted fact in the case, that Henry C. Brown never acquired any interest in said land whatsoever by said deed, and never was, prior to the beginning of this action, the owner of any interest of said Mary Dauphinais, or through her, in and to said land.

On or about the 11th day of May, 1875, the scrip patent issued December 29, 1868, was held for cancellation, and on the same date instructions issued from the Commissioner of the General Land Office to the register and receiver at Pueblo, Colorado, respecting the lands herein involved, in the words and figures as follows—that is to say:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *May* 11, 1875.

"REGISTER AND RECEIVER,
"*Pueblo, Colorado.*

"GENTLEMEN: Referring to decisions of the supreme court of California to the effect that the scrip issued by the Department of the Interior under the treaty of the 30th of September, 1854, with the Chippewas of Lake Superior and the Mississippi, was issued without authority of law, and that the patents founded on the location of said scrip are void on their face, I have to state that in a communi-

cation addressed to this office, under date of March 29th last, the Secretary of the Interior has decided that the act approved June 8th, 1872 (Statutes, vol. 17, page 340), is, in his judgment, broad enough to cover the cases of location of said scrip in the State of California and elsewhere, and to entitle the *bona fide* holders of the lands embraced in the said locations to the relief provided in the said act.

"The Secretary, under the authority vested in him by the said act, and in view of the strong equities attaching to the cases under consideration, fixes the price at which such *bona fide* holders of the said lands shall be permitted to purchase the same at $2.50 per acre.

"I have therefore to direct that you give notice to the *bona fide* holders of the lands embraced in the location of the scrip enumerated in the accompanying list to the effect that he will be allowed 60 days from date of notice in which to appear at your office and make surrender of the patent, to be accompanied by a duly executed deed of relinquishment to the United States of all right and title to the tracts acquired under said patent, together with a certificate of the recorder or other officer having charge of the records of the county wherein such tracts may be situated to the effect that the said deed of relinquishment has been duly recorded by him; that the said records show no other conveyance or incumbrance of said lands by the party executing the deed as aforesaid, and that the said records show the title to the said lands to be in the party making such deed; that said deed may be executed on the back of the patent.

"On a strict compliance with the foregoing requirement, you are hereby authorized to allow the party in interest to make payment for said lands with cash or military bounty land warrants at $2.50 per acre.

"The certificates of entry or location, as the case may be, to bear across their face in red ink a reference to this letter by its date. Be pleased to acknowledge the receipt of this letter.

"Very respectfully,

"S. S. BURDETT,

"*Commissioner.*"

In pursuance of the foregoing instructions issued by the Commissioner of the General Land Office, Henry C. Brown executed a deed of relinquishment to the United States of the said land, in the following words and figures:

"Know all men by these presents that in pursuance of the provisions of the act of Congress, approved June 8, 1872, entitled An act to perfect certain land titles therein described, and in accordance with the instructions of the Secretary of the Interior and Commissioner of the General Land Office thereupon, and in order that I may enter said lands and receive a patent therefor under the provisions of the act aforesaid, I, Henry C. Brown, grantee of Mary Dauphinais, to whom the within patent for the S.E. ¼ of the N.E. ¼ of section 25, township 20 south, range 65 west, and S.W. ¼ of N.W. ¼ of section 30, township 20 south, range 64 west, in the district of lands subject to sale at Denver City, Colorado Territory, containing 80 acres, was issued, do hereby surrender and relinquish unto the United States of America all my right, title, and interest of, in, and to said land under the within patent.

"In testimony whereof I have hereunto set my hand and seal this 20th day of May, 1875.

"Attest:

"HENRY C. BROWN. [SEAL.]"

Prior to July 19th, A. D. 1876, and within the time allowed by the letter of the Commissioner of the General Land Office, dated May 11, 1875, Henry C. Brown appeared at the said land office at Pueblo, Colorado, and surrendered and relinquished the scrip patent dated December 29, 1868, from the United States to Mary Dauphinais, in accordance with the requirements of the Commissioner of the General Land Office as set forth in his said letter, and at the time of such surrender Brown made application to purchase the said land under the act of Congress approved June 8, 1872 (17 Stat. 240), referred to in

the said letter of the Commissioner of the General Land Office and in Brown's deed of surrender and relinquishment; Brown's deed of surrender and relinquishment of the said land with the said surrendered patent and Brown's application to purchase as herein set forth were duly forwarded to the Commissioner of the General Land Office, and on or about July 19, 1876, the scrip patent of December 29, 1868, issued to Mary Dauphinais for the land involved in this action was actually cancelled by the action of the Commissioner of the General Land Office.

On the 19th of July, 1876, the Commissioner of the General Land Office issued the following instructions to the register and receiver at Pueblo, Colorado:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *July* 19, 1876.

"REGISTER AND RECEIVER,
"*Pueblo, Colorado:*

"GENTLEMEN: Referring to the letter of this office to you, bearing date Nov. 1st, 1875, in the matter of the case of B. M. Smith *v.* H. C. Brown, involving the right to purchase the S.E. ¼ N.E. ¼ sec. 25, T'p 20 S., R. 65 W., and S.W. ¼ N.W. ¼ sec. 30, T'p 20 S., R. 64 W., Colo., under act of June 8th, 1872, I have to advise you that on the 6th inst. the Hon. Secretary of the Interior approved the decision of this office, rendered Sept. 2nd, 1875, in favor of Brown.

"Mr. Brown's application to purchase is herewith returned to you. On receipt of the purchase money you will issue certificate in this case, giving the same the proper number of your current cash series, and make a reference, in red ink, on the face of certificate, to letter of instructions to you under date of May 11th, 1875.

"Copy of the Secretary's decision herewith.

"Very respectfully,
"J. A. WILLIAMSON,
"*Commissioner.*"

Pursuant to the several acts herein set forth, and to the instructions of the Commissioner of the General Land Office embraced in his letters bearing date May 11, 1875, and July 19, 1876, hereinbefore referred to, Henry C. Brown made private cash entry of said land under said act of June 8, 1872; a certificate was issued to him (Brown) in accordance with such instructions of the Commissioner bearing date August 2, 1876, and was numbered 1728, and embraced the following words and figures:

"It is hereby certified that, in pursuance of law, Henry C. Brown, of Arapahoe county, State of Colorado, on this day purchased of the register of this office the lot or S.E. ¼ N.E. ¼ sec. 25, T'p 20 S., R. 65 west, and the S.W. ¼ of N.W. ¼ of section No. thirty (30), in township number twenty (20) south, of range No. 64 west, containing eighty acres, at the rate of two dollars and fifty cents per acre, amounting to two hundred dollars and — cents, for which the said Henry C. Brown has made payment in full as required by law.

"Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Henry C. Brown shall be entitled to receive a patent for the lot above described.

"KEYES DANFORTH,
"*Register.*"

That the aforesaid certificate had written across its face in red ink the following endorsement, to wit:

"Entry allowed in accordance with instructions contained in Com.'s letter 'C' of July 19, 1876."

That the "receiver's receipt," issued by virtue of said entry was numbered "1728," and was dated at the "Receiver's office at Pueblo, Colo., Aug. 2, 1876," and contained the following recital, to wit:

"Received from Henry C. Brown, of Arapahoe county, Colorado, the sum of two hundred dollars and — cents, being in full for the S.E. ¼ N.E. ¼ of sec. 25, township 20 S., R. 65 W., S.W. ¼ N.W. ¼ of sec. 30, T. 20 S., R. 64 west, $2.50 per acre, $200.00.

"M. H. FITCH,
"*Receiver.*"

That across the face of said receipt, in red ink, was the following endorsement, to wit:

"Private entry. Entry allowed in accordance with instructions contained in Com.'s letter 'C' of July 19, 1876."

That the "duplicate receiver's receipt," issued by virtue of said entry, was on its face a true copy of the aforesaid "receiver's receipt;" that said duplicate receiver's receipt had across its face, in red ink, the following endorsement, to wit:

"Private entry.
"Duplicate.
"Entry allowed in accordance with instructions, Com.'s letter 'C' of July 19th, 1876."

That upon the back of said "duplicate receiver's receipt" were the following endorsements, to wit:

"1728." "Private cash entry."
"Sec. 25, T. 20 S., 65 W., Henry C. Brown."
" " 30, " 20 S., 64 "
"U. S. land office, Pueblo, Colo., Aug. 2, 1876."
"Entry allowed in accordance with inst. con. in Com. letter 'C' of July 19, 1876."

That the aforesaid "receiver's receipt" was, on or about the said 2d day of August, 1876, at 3 o'clock P. M. of said day, filed for record in the office of the clerk and re-

corder of said Pueblo county, and was duly recorded on page 309 of Book 17 of Pueblo county records; that across the face of the record of said receiver's receipt there was written, in red ink, "Private entry. Entry allowed in accordance with instructions contained in Com.'s letter 'C' of July 19, 1876."

That the aforesaid certificate No. 1728 was deposited in the General Land Office, and that by virtue thereof the President of the United States, under and by virtue of said act of June 8, 1872, issued to said Henry C. Brown, under the seal of the General Land Office, a patent for said land in controversy, on the 1st day of December, 1876.

It is alleged by the plaintiff in error, and admitted to be true, that the act of June 8, 1872, hereinbefore referred to, does not authorize the issuance by the President or any officers of the United States of any patent for any lands of the United States situated outside of the Territory ceded to the United States by the treaty of September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi hereinbefore referred to, and that none of the lands ceded to the United States by the terms of said treaty are situated within the State of Colorado.

It is further alleged by the plaintiff in error, and admitted to be true, that the lands involved in this suit were never offered at public sale to the highest bidder under the provisions of the act of Congress approved April 24, 1820 (Stats. at Large, 556), prior to the application to enter the same by said Henry C. Brown and the issuance of a patent to said Henry C. Brown therefor, and that said land was not at the time of Brown's application to purchase the same, and never has been, subject to purchase at private entry under the laws of the United States

governing the disposition of the public lands of the United States.

It is further averred by plaintiff in error, and admitted to be true, that the said patent issued to said Henry C. Brown, which was issued to him on the 1st of December, 1876, as hereinbefore set forth, refers therein and in the body thereof to the certificate, number 1728, upon which said patent was issued, and recites that Henry C. Brown has deposited in the General Land Office of the United States the said certificate of the register of the land office at Pueblo, Colorado, whereby it appears that said Henry C. Brown has made full payment for the land involved in this action according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of public lands," and that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, by the said patent conveyed said land to said Brown.

It is further alleged by the plaintiff in error, and admitted to be true, that said patent to Henry C. Brown is unintelligible without reference to and unless read in connection with said certificate No. 1728 and the letters of the Commissioner of the General Land Office referred to in the endorsement across the face of said certificate—that is to say, the letter of July 19, 1876, and the letter of the Commissioner of the General Land Office dated May 11, 1875, referred to in the said letter of the Commissioner of July 19, 1876; that said certificate and said letters became a part of said patent.

The defendant in error acquired title to the land in controversy through said patent to Henry C. Brown, and the things done in procuring the issuance of the same by and through divers mesne conveyances.

It is alleged by the plaintiff in error, and is admitted to be true, that neither the said receiver's receipt nor the said patent to said Henry C. Brown gave to said Brown any title or interest whatsoever in or to said land, the subject of this action, but, on the contrary, that both said receiver's receipt and said patent were issued without any authority of law and are void on their face and are no evidence of title whatsoever of the defendant in error in or to the lands involved in this action, and that the title to said land is in the United States and that the same is subject to homestead entry under the laws of the United States.

The defendant in error, then the plaintiff in the pending action, filed a demurrer to the answer of plaintiff in error, then the defendant in the pending action, in the district court in and for Pueblo County, Colorado, on the 2d day of December, 1889, and on the 20th day of December, 1889, said demurrer was by the court sustained, and an order was entered by the court sustaining the same, the then defendant, now the plaintiff in error, excepting to said order.

Thereupon, on the 13th of January, 1890, the following stipulation for judgment was filed in said cause:

"STATE OF COLORADO, } ss:
"*County of Pueblo,* }

"In the District Court thereof.

"JANE C. BROWN, Plaintiff, }
v. }
"JOHN D. FEE, Defendant. }

"And now come parties, plaintiff and defendant hereto, by their respective attorneys of record in said cause, and stipulate as follows—that is to say:

"First. The plaintiff, Jane C. Brown, hereby dismisses the second and third cause of action in said complaint set forth and all rights thereunder in anywise accruing, and

rests her whole case on the first cause of action set forth in said complaint.

"Second. That for the purposes of these proceedings only it is hereby stipulated that said plaintiff has offered in evidence a patent from the United States to one Henry C. Brown for the premises in dispute in this case, said patent bearing date December 1, 1876, and also a certain mesne conveyance from the said Henry C. Brown to one Frank Owers, and also a like conveyance from the said Owers to the plaintiff, Jane C. Brown, over the objections of the defendant herein, and that judgment be entered in favor of plaintiff for the possession of the said described premises, according to the prayer of the complaint; that said judgment shall be entered *pro forma* and merely for the purpose of settling the issues raised herein, and that the clerk of this court be hereby authorized and instructed to enter said judgment in pursuance of this stipulation.

"Third. That this cause be tried in the Supreme Court on the issue tendered by the separate answer of the defendant herein and the demurrer to the same hereto filed.

"It being the intent of the parties hereto that this cause be fully tried on the first cause of action set forth in the complaint, the separate answer filed in said cause in answer thereto, and the demurrer to said answer with like effect as if the said patent and the said mesne conveyances from Henry C. Brown to Frank Owers and from Frank Owers to plaintiff, Jane C. Brown, had been offered in evidence by the plaintiff and directly passed upon by the court and admitted in evidence and proper exceptions thereto preserved by the defendant, and all the papers described in defendant's answer or set up *in hæc verba* in said answer had been likewise offered in evidence on the actual trial of the cause, the same overruled, and proper exceptions preserved thereto.

"Dated January 11th, 1890.

"JANE C. BROWN,
"By M. B. GERRY,
"*Her Attorney.*
"JOHN D. FEE,
"By FRED. BETTS,
"*His Attorney.*"

Judgment was entered *pro forma* in accordance with this stipulation (see p. 21 of Record), and thereupon an appeal was taken to the supreme court of the State of Colorado from the judgment sustaining the demurrer, entered December 20, 1889, and the judgment of restitution entered by the clerk of the court under the stipulation of the 13th day of January, 1890, which appeal was thereupon heard and the judgment of the district court of Pueblo county, Colorado, affirmed on the 6th of June, 1892 (see p. 26 of Record); the supreme court of Colorado filed an opinion therein as disclosed on pages 26–34 of the record. Thereupon a petition for rehearing was filed by plaintiff in error, which was denied by the court, the 30th day of June, 1892.

A writ of error to the Supreme Court of the United States from the judgments of the supreme court of the State of Colorado rendered herein June 6, 1892, and the refusal of said court on the 30th of June, 1892, to vacate said judgment and grant a rehearing, was sued out on the 29th day of August, 1892, whereupon this cause was brought to this court.

Subsequently, on the first day of May, 1893, a motion to dismiss the writ of error herein or affirm the judgment of the supreme court of Colorado was filed in this court by defendant in error, which was submitted on printed briefs; the court ordered on the tenth day of May, 1893, that the consideration of the motion be postponed to the hearing on the merits.

The motion to dismiss or affirm is therefore now pending before the court, briefs thereon having been filed by both sides.

Assignment of Errors.

The plaintiff in error assigns the following errors of the supreme court of the State of Colorado in addition to

and supplemental of the errors heretofore assigned in this cause, presented to Charles D. Hoyt, C. J., and made a part of the record herein (see Record, pp. 1 and 2), viz:

a. The court erred in failing to hold that the patent issued to Henry C. Brown on the 1st day of December, 1876, which contained in its body and bore on its face a reference to certificate No. 1728, upon which the said patent was issued, should be read and considered in connection with the said certificate and the letters of the Commissioner of the General Land Office referred to in said certificate.

b. Considering the recitations contained in the said patent, issued to Henry C. Brown, which recites the fact that Henry C. Brown has deposited said certificate (certificate No. 1728) of the register of the land office at Pueblo, Colorado, whereby it appears that Henry C. Brown has made full payment for the land involved in this action according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of public lands," in consideration whereof said patent was issued and the land conveyed by said patent to said Brown, and considering the said patent in connection with the act of Congress of the 24th of April, 1820, and with the fact that the land was never offered at public sale to the highest bidder, as required by the terms of the said act of Congress, the court erred in failing to hold said patent to be void on its face, and to be inoperative to convey a right or title to the land involved in this action.

c. The court erred in holding that the act of Congress, approved June 8, 1872, being an act to perfect certain land titles therein described (17 Stat., p. 340), authorized the location of the Chippewa certificate, No. 45–D, issued under the seventh clause of the second article of the treaty

with the Chippewas of Lake Superior and the Mississippi, dated September 30, 1854, upon the lands involved in this action, being public lands of the United States in the State of Colorado, and that said act of 1872 authorized the location of such certificate upon lands not offered at public sale under the provisions of the act of April 24, 1820, in the State of Colorado, and that said act of 1872 authorized the private sale of said land located in Colorado, for the considerations named in the patent, to Henry C. Brown, which were $2.50 an acre, and the surrender of the void patent theretofore issued to Mary Dauphinais.

d. The court erred in not holding the patent issued to Henry C. Brown to be void on its face, because when said patent is read in connection with the recitations and considerations named therein it appears that Congress has made no provision for the sale and disposition of the land which said patent purports to convey in the manner in which the said patent purports to sell and convey the same.

e. The court erred in failing to give weight to the admitted fact that the certificate given to Mary Dauphinais (45-D) was given for the purpose of identifying the said person, and for no other purpose, and that no warrant of law existed by virtue of the seventh clause of the second article of the treaty of 1854 (10 U. S. Stat. at L. 1110), or otherwise, for the taking or location of land by mixed bloods of the Chippewas of Lake Superior and the Mississippi, except within the territory ceded by said Indians to the United States by said treaty in its first article, being lands theretofore owned by them, the said Indians, which did not embrace lands in the State of Colorado or the lands involved in this action, and that the consideration named in the patent to Henry C. Brown, being in part the surrender of the patent before granted to Mary

Dauphinais and in part money at private sale of unoffered lands, the said patent was issued without authority of law, and is void upon its face.

f. Having held that the patent of 1868 through which Henry C. Brown originally claimed title was invalid, the court erred in failing to hold that the patent issued to Henry C. Brown on December 1, 1876, in lieu of that of 1868 to Mary Dauphinais, surrendered, when read in connection with the records referred to therein and in connection with the treaty of 1854, the act of April 24, 1820, and the act of June 8, 1872, was issued without jurisdiction by the officers of the United States who issued the same, and that the same is void upon its face, and being so void it does not pass the title of the lands involved in this action, nor cast a cloud upon it which impairs the right of plaintiff in error to said land as his homestead under the laws of the United States.

g. It being an admitted fact raised on the answer of plaintiff in error and the demurrer thereto that the patent to Henry C. Brown was issued without authority of law and is void on its face, and that the same is no evidence of title, the court erred in failing so to hold.

h. The court erred in affirming the judgment of the district court of Pueblo county, Colorado, with costs and in not reversing said judgment and awarding costs to this plaintiff in error.

ARGUMENT.

Congress has made no provision for the sale and disposition of the lands involved in this action in the way it purports to have been disposed of under and by virtue of the patent to Henry C. Brown of December 1, 1876. The act of Congress of April 24, 1820 (3 U. S. Stats. L. 566)

entitled "An act making further provisions for the sale of public lands," according to the provisions of which full payment for the land is recited in the patent to have been made, provides by its third section that "all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sales, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid."

It is an admitted fact that the lands in controversy were never offered at public sale to the highest bidder (Record, p. 17). This court has held that "It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry."

Eldred *v.* Sexton, 19 Wall., p. 189.

Unless Congress by special act ordered otherwise, private entries have never been allowed unless the land applied for had been previously offered at public sale to the highest bidder at the same price. This has been the established practice at the land office, sanctioned by the law officers of the Government, and recognized by this court as a leading feature in our system of land sales.

The treaty of 1854 (10 Stat. L. 1110), in its seventh clause of the 2d article thereof, the act of Congress approved December 19, 1854, being "An act to provide for the extinguishment of the title of the Chippewa Indians to the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin, and for their

domestication and civilization" (10 Stats. L. 598), and the act of Congress approved June 8, 1872 (17 Stats. L. 340), being "An act to perfect certain land titles therein described," do not separately or when construed together repeal or modify the act of April 24, 1820, except as the act of 1872 is operative respecting public lands of the United States to which claims arose under the said seventh clause of article 2 of the treaty of 1854.

The act of December 19, 1854 (10 Stat. L. 598), provides as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be, and he is hereby, authorized to cause negotiations to be entered into with the Chippewa Indians for the extinguishment of their title to all the lands owned and claimed by them in the Territory of Minnesota and State of Wisconsin, which treaties shall contain the following provisions and such others as may be requisite and proper to carry the same into effect:

"*First.* Granting to each head of a family, in fee simple, a reservation of eighty acres of land, to be selected in the territory ceded, so soon as surveys shall be completed, by those entitled, which said reservations shall be patented by the President of the United States, and the patent therefor shall expressly declare that the said lands shall not be alienated or leased by the reservees or their heirs and legal representatives until otherwise ordered by Congress, and no change of location shall be made without the assent of the President of the United States.

* * * * * * *

"*Third.* All the benefits and privileges granted to said Indians shall be extended to and enjoyed by the mixed bloods belonging to or connected with the tribe, and who shall permanently reside on the ceded lands."

The treaty of 1854 had not been ratified at the date of

the passage of this act and was not ratified until January 10, 1855, and it is operative subject to this act.

Article 2 of the treaty provides as follows:

"The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz:"

Then follow six clauses setting apart as many reservations within the territory ceded by article 1 of the treaty, and then the seventh clause of article 2 of the treaty in the following words:

"Each head of a family or single person over twenty-one years of age at the present time, of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form."

In Parker *v.* Duff (47 California, 566), the supreme court of California said, respecting the validity of selections by this "Chippewa scrip" in the State of California, as follows: Scrip issued for public lands selected outside the ceded territory is issued without authority of law, and patents issued therefor which show for what they were issued are void on their face.

The same general doctrine is held by this court as to lands lying outside of the ceded territory, in Stone *v.* The United States (2 Wall. 525), in construing the Delaware treaty of May, 1854.

The first article of that treaty provided that there should be assigned to each member of the tribe a tract of land containing eighty acres, and within their reservation, while the seventh article provides that, "in consideration of the long and faithful services of the chiefs of

the Delaware Nation, and of their interpreter, who is also a member of the nation, it is further agreed that the said chiefs and interpreter shall have allotted to each a tract of land, to be selected by themselves, and shall receive a patent in fee simple therefor from the President of the United States."

As in the Chippewa treaty, the members of the nation generally were in terms confined to the reservation and were not permitted to make their own selections; while the chiefs and the interpreter were allowed, as were the Chippewa mixed bloods, to select lands themselves, and for which patents should issue. There was no limitation in words in the treaty, in either case, upon the power of selection. But, nevertheless, in the Delaware case this court held that, as the lands so claimed by the chiefs were not within the tract allotted to the Delaware Indians, nor upon the tracts reserved for the permanent home, or to be sold for the use of the tribe, the patents issued therefor were without authority and void.

If these patents had disclosed the fact that they were issued under the Delaware treaty and for land beyond the allotted tracts, as does the Chippewa patent in question, their invalidity would have appeared when read in the light of the treaty, and they would have been void on their face.

The court below in this cause held the location of the land in controversy and the patent originally issued to Mary Dauphinais, under which Brown first held, to be invalid, on the doctrine laid down in Parker *v.* Duff (see Record, p. 28).

It is urged upon the authority of that case that the treaty of 1854, referred to in the written instruments incorporated into the patent of December 1, 1876, and forming one instrument with that patent, does not warrant

the location of land outside of the ceded territory by Chippewas of mixed blood, and that therefore the patent of December 1, 1876, is not only invalid, but clearly void on its face.

The act of 1872, cited *supra*, does not extend the operations of the treaty and the act of December 19, 1854, as to location of land by Chippewas of mixed blood. That act provides as follows:

"The Secretary of the Interior is authorized to permit the purchase, with cash or military bounty-land warrants, of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September 30, 1854, at such price per acre as he deems equitable and proper; but not at a less price than one dollar and twenty-five cents per acre; and the owners and holders of such claims in good faith are also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned; but it must be shown to the satisfaction of the Secretary of the Interior that such claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith, and by innocent holders of the same."

The act expressly limits the Secretary of the Interior to "permitting the purchase of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty," and the history of the times shows that Congress then knew of the existence of more than 450 claims arising under this clause of the treaty which had been located upon over 35,000 acres of land within the ceded territory, presumably in good faith by innocent holders thereof. (House Ex. Doc. No. 193, 42d Cong., 2d Sess.) And as no claim could legally arise under this clause of the treaty which would warrant the location of lands beyond the cession, clearly the Secre-

tary of the Interior acquired no jurisdiction from the act of 1872 to sell and issue a patent for lands lying outside that territory.

It cannot be disputed that without the powers conferred upon the officers of the Land Department by the act of 1872 no jurisdiction existed to sell the land in controversy to Brown and issue a patent therefor; but the difficulty is only intensified by looking at the act of 1872 in connection with the patent. That act limits the jurisdiction of the Secretary, by its express terms, to the sale of land located with claims arising under the seventh clause of the second article of the treaty, which clearly could only arise within the ceded territory; the patent to Brown is for lands outside of the ceded territory, and no jurisdiction attached to the officers of the Land Department under the act of 1872 to issue it, and it is therefore void upon its face, because no provision has ever been made by law for the sale of the land in the manner it purports to have been sold to Brown.

Polk's Lessee *v.* Wendell, 9 Cranch, 87.
St. Louis Smelting Co. *v.* Kemp, 104 U. S. 641.
Wright *v.* Roseberry, 121 U. S. 519.
Pallemmy *v.* Winn, 11 Wheaton, 380.

The act of 1872, so far as it relates to public lands, is in *pari materia* with the act of December 19, 1854, the treaty of 1854, in its seventh clause of the second article thereof, and the act of April 24, 1820. It does not repeal by its terms either of the prior acts, or modify the terms of the treaty. The cited acts and the clause of the treaty must be so construed as to give force and effect to all and every part thereof. This cannot be done by extending the operations of the act of 1872, in its remedial effects, to lands lying beyond the ceded territory.

The question of the "good faith" of one attempting to enter lands outside of the ceded territory with Chippewa scrip does not enter into this case. Congress not having authorized the disposition of the lands involved in this action in the way in which the same have been attempted to be disposed of, no amount of alleged "good faith" on the part of Brown, or his grantees, can make the void act good. Under the seventh clause of the 2d article of the treaty of 1854, no authority of law ever existed for a claim upon the land involved in this action, and as no claim ever legally existed, the act of 1872, in its remedial effects, does not apply to this land.

But in view of the admitted fact (see answer of plaintiff in error, Record, pp. 17 and 18) that both the receiver's receipt and the patent to Brown of December 1, 1876, were issued without any authority of law, and that they are void on their face, and are no evidence of title, it is submitted that the question before this court, raised by the demurrer, is narrowed down to whether this patent, so admitted to have been issued to Brown without authority of law, and to be void on its face, is, in fact, so void and that it conveys no title. This question has been so frequently resolved by this court in favor of the contention of the plaintiff in error (see cases cited *supra*) that further discussion is deemed unnecessary.

J. M. VALE,
Attorney for Plaintiff in Error.

C. C. CLEMENTS,
FRED. BETTS,
Counsel.

Supreme Court, U. S.
MAR 25 1896
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1895.

JOHN D. FEE,
Plaintiff in Error,
vs.
HENRY C. BROWN,
Executor of Jane C. Brown,
Deceased,
Defendant in Error.

No. 165.

BRIEF OF DEFENDANT IN ERROR.

JAMES H. BROWN,
Attorney for Defendant in Error.

THE SMITH BROOKS PRINTING CO., DENVER, COLO.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1895.

JOHN D. FEE,
Plaintiff in Error,
vs.
HENRY C. BROWN,
Executor of Jane C. Brown, Deceased,
Defendant in Error.

No. 165.

BRIEF OF DEFENDANT IN ERROR.

This is an action of ejectment commenced by Jane C. Brown, against John D. Fee, the plaintiff in error, to recover the possession of certain lands adjacent to the city of Pueblo, State of Colorado.

Fee, for a second answer to the complaint, sets forth the history of the steps preliminary to the issuance of the United States patent to Henry C. Brown, December 1, 1876, under which, he alleges, Jane C. Brown claims title. This answer, together with those matters of which the court may take judicial knowledge, shows the following circumstances:

On September 30, 1854, the United States concluded a treaty with the Chippewa Indians, of Lake Superior and the Mississippi, whereby certain of their lands were ceded to the United States government. (11 U. S. Stats., page 1109.) This treaty was effectuated by act of congress, December 19, 1854. (10 U. S. Stats., L. 598.) By the seventh clause of the second article of this treaty, the United States agreed to patent lands to each head of a family, or single person over twenty-one years of age, of the mixed bloods. In executing this provision, the beneficiaries were identified by the issuance of certificates, called Chippewa half-breed scrip. The form used for all scrip issued prior to the 9th day of February, 1867, besides being made expressly non-assignable on its face, also provided that "the patent for lands located by virtue thereof shall be issued directly to the scripee or his heirs or assigns." There was no legal restriction against the conveyance, by the half-breed, of the patent title when once acquired; and *no provisions* contained on the face of the scrip, *limiting* its purchasing power *to any particular portion of the unappropriated public domain* of the government. In fact, it was from its first issuance, *expressly recognized and received* by the officials of the general land office as *locatable anywhere*

on the unappropriated public domain, both within and without the lands ceded to the government by the treaty provisions.

We are informed by the congressional publication entitled "'Half-Breed Scrip—Chippewas of Lake Superior," "House Ex. Doc., 193, 42d Congress, 2d session," (same document referred to by Fee's counsel at bottom page 23, their brief),that as early as "in 1864, Chippewa scrip began to be considered desirable property, and became an article of trade, and was kept on sale by brokers and at the principal banks of St. Paul," Minnesota. (Page 14.)

Although the scrip was not assignable, the law appears to have been evaded by procuring from the scripee, at the time of the purchase of the scrip, two powers of attorney, both executed in blank as to the names of agents and description of land. One authorized the location of the scrip in the name of the scripee, and the other authorized the conveyance of the patent title issued to the scripee. See "Half-Breed Scrip—Chippewas of Lake Superior." (Pages 269, 270.)

One Mary Dauphinais received scrip as a beneficiary under the said treaty some time prior to February, 1867. (Record, page 10, folio 19.)

In February, 1867, Henry C. Brown, the patentee, from whom Jane C. Brown claims title, purchased the scrip issued to Mary Dauphinais from one Daniel Witter, and Witter, acting as attorney in fact of Mary Dauphinais, located the land in controversy. A United States patent therefor was issued December 29, 1868, to Mary Dauphinais. (Record, pages 10-11, folios 20-2.) Under the second power of at-

torney, Daniel Witter, as attorney in fact for Mary Dauphinais, immediately conveyed the patent title to said Henry C. Brown. There appears to have been considerable abuse and fraud in relation to the issuance, use and dealings in this scrip, as well as some conflicting rulings in the land department whether the scrip could be used to locate land without the treaty cession. Consequently, as appears from said congressional publication entitled "Half-Breed Scrip —Chippewas of Lake Superior," congress, on December 20, 1871, adopted a resolution, calling, among other things, for the following information, viz.:

"*First*—The number of pieces of scrip of eighty acres each, and the names of the parties to whom issued. * * *

"*Fourth*—A copy of said scrip, the manner of locating the same, whether by the parties to whom it was issued or by others, *whether located upon lands ceded* by said tribe, and *all decisions of the department* of the interior *in relation to* the issuance and *location of* said scrip."

On March 12, 1872, the said report, entitled as above, was made to congress. At the same session of congress, by an act approved June, 1872 (set forth at length, post page —), the Secretary of the Interior was authorized to permit the purchase of such lands as had been located, and the completion of entries of claims, owned and held in good faith, arising under the seventh clause of the second article of said treaty. (17 U. S. Stats. at Large, 340.) In 1874, at the Januray term, the Supreme Court of the state of California, in the case of *Parker vs. Duff* (47 Cal., page 554), declared a United States patent similar to the one issued to Mary Dauphinais, under which said Henry C. Brown then held, void on its face—void, because, appearing on its face, to be issued under the provisions of the seventh clause of the

second article of said treaty, which, when construed in connection with the remainder of the treaty, it was held did not authorize a patent to be issued for any lands without the ceded territory. In May, 1875, Henry C. Brown, having discovered the invalidity of his patent title, made application for the issuance of a new patent, under the provisions of said act of June 8, 1872. He surrendered his Dauphinais patent title, and, after a contest with one B. M. Smith, was adjudged by the Honorable Secretary of the Interior to be entitled to a new patent, which was accordingly issued to him, dated December 1, 1876. This patent, Fee attacks as void on its face, and as being issued without authority of law. For this purpose, he alleged in his said answer all the correspondence and action of the land officials which resulted in the issuance of said patent. To this answer Jane C. Brown demurred, on the ground of insufficiency. Upon the hearing in the court below, this demurrer was sustained. All the matters having been alleged in this answer, which Fee would have sought to prove on the trial, under the issue made by his general denial, final judgment was, by stipulation, entered for Jane C. Brown, sustaining the said patent and holding the said answer invalid. To reverse this judgment, Fee prosecuted an appeal to the Supreme Court of Colorado, where the judgment of the court below was affirmed. (17 Colo., 510.) To reverse that judgment, Fee prosecuted this writ of error.

THE PATENT.

Fee attacks the patent issued to Brown December 1, 1876, under the act of June 8, 1872, by showing

the steps taken in the land department preliminary to its issuance. In so doing, his counsel (Arugment, pages 11-13, and elsewhere) claims that by demurring to Fee's answer numerous allegations of conclusions of law are admitted. But the rule is settled that a demurrer, for the purpose of its determination, only admits the material allegations of fact in the answer, which are well pleaded. (Foote vs. Link, 5 McL. C. Ct., 16; McLean vs. Bank, 3 Id., 415; Griffin vs. Gibb, 2 Black, 519, 523.)

A demurrer does not admit either conclusions of law or confess impertinent or immaterial matters. (1 Boone on Code Pldg., section 118.)

The proceedings of the land department preliminary to the issuance of the patent could not be considered as admitted by the demurrer for the purpose of attacking the patent as void on its face, for the following reasons:

1. If the phrase, "void on its face," has any meaning in the English language, it means that the question must be settled from an inspection of the language contained within the four corners of the patent; for, this court has repeatedly said:

> "Something more, however, than an apparent contradiction in its terms is meant when we speak of a patent being void on its face. It is meant that the patent is seen to be *invalid, either when read in the light of existing law, or by reason of what the court must take judicial notice of.*"
>
> Smelting Co. vs. Kemp., 104 U. S., 636, 644.

In the same case it is said that:

> "The patent is evidence that all previous steps have been regularly taken to justify making of the patent."

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the land department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

United States vs. Marshall S. Mng. Co.,
129 U. S., 579, 589.

Therefore, if a patent does not, by the language on its face, i. e., contained within its four corners, when read in the light of existing law (this patent recited that it was issued "in conformity with the several acts of congress in such case made and provided," etc., R. 17, folio 32), or of what the court must take judicial notice of, does not appear to be invalidated, then it is open to attack as being void upon its face.

2. But Fee did not anywhere set out the language of the patent in its entirety. He set out portions thereof, and then, by allegations of conclusions of law, attempted to show its invalidity, by supplying the omission of the patent with such allegations as that "said patent is unintelligible without a reference to said certificate No. 1728, and the commissioners' letters of July 19, 1876, and May 11, 1875, and that said certificate and letters became thereby a part of said patent." (R. 17, folio 32.)

It is submitted this cannot be done, because, the very fact of making these allegations of fact shows they are neither matters of "existing law" nor matters of which "the court cannot take judicial knowledge of," and so, in contemplation of law, do not appear upon the face of the patent.

Moreover, the exact language of the patent must be set forth in its entirety, to enable the court to pass on the question. For pleadings and evidence must each agree with the other; in this pleading, if it is to stand as evidence, the rule must be as in evidence, that the very best showing susceptible of the case must be made. Such evidence cannot be anything less than the *exact language of the entire patent itself.*

"But no principle is more clearly settled, than that the construction of the written evidence is *exclusively for the court.*" (Levy vs. Gadsby, 3 Cranch, 180, 186; Goddard vs. Foster, 17 Wall., 123, 142; Hamilton vs. Liverpool Ins. Co., etc., 136 U. S., 242, 255.)

"So the question as to its validity upon its face, as whether it appears to be duly executed or the like, is a question of law for the court." Hughes vs. Dundee Mtg. Co., 140 U. S., 98, 104; 1 Elts. Genl. Pr., 537, Sec. 431.)

If the language of the patent itself is the best showing, and that which alone, when considered with existing law and matters of which the court must take knowledge must determine whether it is void upon its face, and the question of construction is exclusively for the court, and the patent itself is presumptive evidence that the steps preliminary to its execution have been lawfully taken, then it is submitted that this presumption attaching to the patent title cannot be attacked or overborne in any other different manner than by the allegation of all of the exact language of the patent contained within the four corners of the instrument. In no way can the court properly and correctly construe the patent if it accept as a substitute for the language of that written document, allegations of conclusions of law to supply omitted portions of the

patent. The burden of overcoming the presumption of regularity attaching to the patent was upon Fee, and his plea is insufficient without setting forth the entire patent.

3. Nor does the doctrine of reference from one document to another aid Fee's position; for, the construction of the patent being exclusively a question for the court upon all the language thereof, it must be for the court to say whether all the language of the patent upon its face does, in law, properly or necessarily refer to and make a part thereof, any other document or documents. Nowhere in Fee's pleading has he alleged that the patent *expressly* refers to either the certificates or the letters claimed by him to be a part of this patent. His claim is that because, as he alleges, the patent refers to the certificate and the certificate has a red ink endorsement referring to the letters, etc., that they all are thereby made *a part of the face* of the patent. This cannot be maintained.

"Of course when the *documentum referens* designates the *documentum relatum* as giving essential independent features of the transaction to which the two relate, then the first cannot be received in evidence without the other, because the first is in itself incomplete.

"But it is otherwise when the *documentum referens* professes to be *complete in substance*, though condensed in form."

1 Wharton on Ev. (2d Ed.) section 618.

"Upon issuance of the patent the presumption obtains that all the requirements preliminary to its issue have been complied with."

Poire vs. Wells, 6 Colo., 406, 409.

The position taken by appellant on this question is very similar to that taken by counsil in the case

of *United States vs. Halleck*, where it was sought to defeat the confirmation of a Mexican grant by raising an inquiry as to a matter of boundary on the basis of a reference to a map and petition which was contained in the decree of confirmation. In disposing of the question, Justice Field, who delivered the opinion of the court, said:

> " 'Their position is, that this description is to be controlled by the original grant and by the petition and map contained in the *espediente*, to which reference is made at the close of the decree; in other words, that the question of boundary is open for adjudication precisely as it would be if no description had been given. The position of the learned counsel in this respect cannot be maintained. *The documents to which reference is made can only be resorted to in order to explain an ambiguity in the language of the description given; they cannot be resorted to in order to change the natural import of the language used, if there be no uncertainty therein. If reference to original title-papers, where no doubt arises upon the the terms of the decree*, would authorize an inquiry into a matter of boundary, *it would with equal propriety authorize an inquiry into any other matter upon which the commission had acted; and every question affecting the decree might be opened anew to consideration and contestation.*
>
> " 'The decree in this case is plain, and admits of only one construction: the object of the appellants is to change the meaning of its language by showing that the commissioners were ignorant of the true course and direction of the American river, and therefore intended different lines from those they specifically declared, and that they could not have intended the eastern line to run as directed, in disregard of what is asserted to be the true position of the "lomerias."
>
> " 'The answer to all efforts of this kind is, that the decree is a finality, not only on the question of title, but as to the boundaries which it specifies.' "

United States vs. Halleck, 1 Wall., 439, 455, 456.

As the patent is presumptive evidence of proper performance of the preliminary steps, so this certifi-

cate and these letters and the preliminary proceedings are not by reference made a part of the patent.

4. Again, the doctrine of reference is further limited in that the *documentum relatum* is only a part of the *documentum referens to the extent and for the purpose of the reference, and no further.*

It is the custom in England for persons, desiring to secure concessions for railroad and similar corporations, to present plans to Parliament, or the proper committee thereof, showing the mode and extent of the proposed work.

In such a case, where it was contended that the company obtaining the act or contract was bound by representations contained on plans showing the mode in which the works are to be carried on, it was said:

"Now, as to the effect of plans exhibited previous to the contract being made, or previous to the act of parliament being obtained, * * * If a contract or an act of parliament refer to a plan, *to the extent that the act refers to the plan*, and *for the purpose* for which the act or contract refers to the plan, undoubtedly it is a part of the contract or part of the act; about that there is no dispute. A contract or act of parliament either does not refer to a plan at all, or it refers to it for a particular purpose. * * *

"Taking that then to be the rule, in examining the facts of this case, and the act of parliament upon which the question turns, *we are not to look at what was represented upon the plan, except so far as its representation is incorporated in and made part of the act of parliament.*"

The North British Ry. Co. vs. Tod, 12 Clark & Fin., 722, 731, 732.

"For instance, if the act of parliament enacted that the railway should go in the line described in a particular plan, it is obvious that the plan must be referred to, in order to understand the enactment. So far, therefore, as it was incorporated

in the act, it was part of the act; and so far as it was not incorporated therein, it was a matter not creating any right between the parties."

Beardmer vs. London & N. W. Ry. Co., 1 Hall & Twells' Rep., 161, 170, 171.

The same rule is illustrated where, on the hearing of a case before the House of Lords, a lease had been introduced in the court below, but the bill of exceptions only contained certain provisions therein set out, and it was attempted to use the whole lease on argument, it was said:

"The reference to them in the bill of exceptions was not for the purpose of vouching for the contents of the lease, but only for such parts as were extracted into the bill of exceptions itself. And the counsel was ordered to confine their arguments to what appeared on the bill of exceptions."

Galwey vs. Baker, 5 Clark & Fin., 157, 162.

Fee has not set out the patent at length, so that the court could judge for itself from reading it; nor has he pleaded any ultimate facts, showing that there is in the patent any *express* reference to the certificate and letters *for any purpose* essential to its validity. Therefore, there are no grounds laid for the application of the rule which he invokes.

5. The utmost that can be said of Fee's allegations touching the reference in the patent to the certificate, is that the same was a recital. Recitals are *not a necessary* part of the patent.

3 Wash. on R. P. (4th Ed.), 431. * * * (639).

But the statutory provisions prescribing the manner in which a patent of the United States for land shall be executed, are *mandatory*. No equivalent is allowed.

McGarrahan vs. Mining Co., 96 U. S., 316.

"A patent upon its face should either grant or not grant. It must be seen from the construction of the language of the grant itself whether anything is granted or not, and, if anything be granted, what it is."

Cowell vs. Lammers, 21 Fed. R., 200, 208.

So, it is held that the officers of the land department, by inserting provisions in a patent not required by statute, can neither broaden nor narrow its force and effect.

S. B. M. & M. Co. vs. Clark, 5 Mont., 378; s. c., 5 Pac., 570, 582.

Talbot vs. King, 5 Mont., 76; s. c., 9 Pac., 434, 435.

Clary vs. Hazlett, 67 Cal., 286; s. c., 7 Pac., 701, 702.

"The patent must be construed according to the acts of Congress authorizing its issuance; and while *the recitals therein* set forth *may indicate the views* of the government officers respecting the rights of the parties, the *form and manner of executing the patent must be in conformity to the laws of Congress.*"

Mayor, etc., vs. Aspen T. & L. Co., 10 Colo., 191, 200.

But:

"It is seldom, however, that the recitals of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. * * * *Something*

more, however, *than an apparent contradiction in its terms is meant*, when we speak of *a patent being void on its face.*"

Smelting Co. vs. Kemp, 104 U. S., 636, 644.

Therefore, as these recitals show no repugnancy to the granting clause of the patent, and are not a necessary part of the patent, the same is not void on its face.

6. But Fee, having failed to set forth in full the language of the entire patent, cannot make the certificate and the proceedings prior to its issuance a part thereof, by invoking either the doctrine of reference or claiming ambiguity in its language; for, the language of the instrument to be construed must first be consulted. If that be clear, further inquiry is precluded.

"But when *the language is free from doubt*, and leaves no uncertainty as to the meaning of the parties, *it must govern.*"

Veazie vs. Forsaith, 76 Me., 172, 179.

"*All latitude* of construction must submit to this restriction, viz., that the *words may bear the sense* which by construction is put upon them. * * * This rule is as applicable to a statute as to a deed."

U. S. vs. U. P. R. R. Co., 91 U. S., 72, 86.

Fee, however, invokes the doctrine of relation, and alleges ambiguity, not to sustain the patent, but to defeat it.

"There is a *material distinction* between the introduction of parol *testimony to contradict* a deed, or other written instrument, and the giving of similar *testimony to explain* a latent ambiguity." * * *

Jackson vs. Roberts' Exrs., 11 Wend., 422, 427.

Fee, not being a party to the patent, was in no position to invoke any rules of construction which might be applied by parties thereto. But if he was a party, there was no room for construction, unless the language was ambiguous or doubtful. If the patent was ambiguous, resort might then have been had to the doctrine of relation to explain such ambiguity, *not* for the purpose of *defeating, but for the purpose of sustaining* the patent. The rule is familiar that antecedent oral and written negotiations are merged in the final written document consummating the parties' agreement.

> "The written contract *merged all previous* negotiations, and is presumed, in law, to express the final understanding of the parties.
>
> "If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject matter of the contract, and the sense in which the parties may have used particular terms, *but not to alter or modify the plain language which they have used.*'
>
> Brawley vs. United States, 96 U. S., 168, 173, 174.

If, as above shown, the patent is presumptive evidence of compliance with preliminary prerequisites, then such preliminary prerequisites must be merged by force of law into the patent upon its execution. Therefore, unless the language of the patent be set forth in full, and when so set forth proves to be ambiguous or uncertain, there is then no room for construction. If it be ambiguous and uncertain, then the only room for construction is in

the application of the doctrine of reference, and the rules allowing explanation of ambiguity, to sustain, but not to defeat, the patent.

By failing to set forth the language of the patent in its entirety, Fee precluded himself from showing that it was void on its face. In attempting to supply this omission, by alleging matters of fact touching the steps preliminary to the issuance of the patent, he conclusively admits, that they are not matters of existing law, or of which the court would be bound to take judicial knowledge, and so he thereby puts himself beyond the test, which determines whether a patent be void on its face. The mandatory provisions of the patent being prescribed by congress, the insertion of recitals in addition thereto by the land department were not and could not be of the essence of the patent, nor control the granting clause so as to invalidate the patent.

The doctrine of relation and the claim of ambiguity, Fee could not invoke because he was not a party to the patent. If he had been a party to the patent, he could not invoke these doctrines unless the language of the patent was doubtful or ambiguous. If its language was doubtful, then these doctrines could only be invoked to sustain the patent. The doctrine had no place in this case, because it was not shown to what extent nor for what purpose the recital to the certificate was made, nor was it shown that the recital was an essential part of the patent.

For these reasons it is respectfully submitted that the steps preliminary to the issuance of the patent of December 1, 1876, to Henry C. Brown, cannot be construed, in contemplation of law, as a part of

the entire patent to be read from its language within the four corners thereof, so that it can be said that it appears to be void upon its face. The matters alleged were all matters relating to steps preliminary to the issuance of the patent. The patent, in its granting clause, was conceded to be issued "in conformity with the several acts of congress." (Page 17, folio 32.)

If there was any act of congress authorizing the issuance of the patent for this land, then the patent on its face was valid.

THE ACT OF JUNE 8, 1872.

Fee's counsel insists that the act of congress of June 8, 1872, did not authoize the secretary of the interior to issue a patent for the land in controversy. He says:

"That act *limits the jurisdiction* of the secretary, by its express terms, to the sale of land located within claims arising under the seventh clause of the second article of the treaty, *which* clearly *could only arise within the ceded* territory; the patent to Brown is for *lands outside* of the ceded territory, and no jurisdiction attached to the officers of the land department under the act of 1872 to issue it, and it is, therefore, void upon its face, because no provision has ever been made by law for the sale of the land in the manner it purports to have been sold to Brown." (Argument, 24.)

The act of congress of June 8, 1872, provides:

"That the secretary of the interior be, and he is hereby authorized to *permit the purchase*, with cash, or military bounty land warrants, of *such lands as may have been located* with *claims arising under* the seventh clause of the second article of the treaty of September 30, 1854, at such price per acre as the secretary of the interior shall deem equitable and proper, but not at a less price than $1.25 per acre, and that *owners and holders of such claims* in good faith be also permitted to *complete their entries*, and to *perfect their titles* under such claims upon compli-

ance with the terms above mentioned; *Provided*, That if shall be shown to the satisfaction of the secretary of the interior that such *claims are held* by innocent parties in good faith, and that the *locations made* under such claims have been made in good faith and by innocent holders of the same. Approved June 8, 1872."

17 U. S. Stats., 340.

U. S. Rev. Stats. (2d Ed.), section 2368.

This statute is not doubtful or ambiguous. Therefore:

"*The court should confine its attention to the law*, and not allow extrinsic circumstances to introduce a difficulty *where the language is plain*."

Cooley's Const. Limits (5th Ed.), *69.

"The law as it passed is the will of the majority of both houses, and *the only mode in which that will is spoken is in the act itself*; and we must gather their intention *from the language there used*."

Aldrich vs. Williams, 3 How., 9, 24.

The act shows that congress provided therein for two classes of cases, namely:

First—"The purchase of *such lands as may have been located* with claims arising under the seventh clause," etc.; and,

Second—"The owners and holders of such claims in good faith are also *permitted to complete their entries*."

Taking the second class first. Entry is thus defined:

"The term *entry* * * * means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several states by the

epithet of an entry-taker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States."

Chotard vs. Pope, 12 Wheaton, 586, 588.

The class of cases which were intended to be covered in the act, by the term "entry," were all those where individuals had in good faith attempted to acquire an "inceptive right" by filing their claims in the local land office.

The word "located," of the first class, is the verb of which the word "location" is the noun, and the latter is thus defined:

"It becomes important, therefore, to know what is meant by *a location* in the act of 1815. It evidently meant *a completed location*. When the land became *located*, the title of the applicant to his New Madrid lands at once reverted to the government. The words of the act are:

"'In every case where such location shall be made according to the provisions of this act, the title of the person or persons to the land injured as aforesaid shall revert to and become absolutely vested in the United States.'

"Now, when did this take place? * * * The act tells us that the surveyor must return the survey and plat, and the notice as to the party for whom the survey was made, to the office of the recorder of land titles, to be by him filed and recorded. Then, and not till then, *the applicant was entitled to a patent*. Then the land first became appropriated. *It then first appeared on the records of the country as his.*"

Hot Springs Cases, 92 U. S., 698, 712, 713.

Apply this same meaning to the word "located," used in the act of congress under consideration, and it will be seen that it is peculiarly apt. The word "patented" could not be used, because the act was passed for the purpose of curing defective titles, and the use of that word would indicate a *valid* title.

That both classes of cases, namely, the attempt to secure inceptive rights—i. e., "entries"—and, the performance of all acts entitling the party to a patent—i. e., land *"located"*—were illegal and void, within the meaning of the act, is shown by the application to each class, of the words, *"claims* arising under the seventh clause," etc. The word "claims" used in this connection is also peculiarly apt. It indicates the right of the party to some portion of the public domain which the party *supposes* he has.

"The word 'claim,' when used in connection with the public lands, has with us a known and definite signification. It refers and relates to a settler's right or improvement, on a tract of land, the fee of which is in the government."

Bowman vs. Torr, 3 Iowa, 571, 574.

The foregoing definition of "claim" applied to that word, when used in a remedial act passed by congress to perfect land titles, is especially fitting.

But, Fee insists that:

"As no claim could *legally arise* under this clause of the treaty which would warrant the location of *lands beyond* the cession, clearly the secretary of the interior acquired *no jurisdiction from the act of* 1872 to *sell* and issue a patent *for lands lying outside that* territory." (Argument, pp. 23-24.)

We may be pardoned, perhaps, for inquiring why congress should pass the act of 1872 to protect *legal* claims. Counsel's statement would seem to suggest that the very reason why the act of congress was enacted, was to protect claims upon lands located with such claims—located not within, but without, the treaty cession.

That such was the intention of congress, is amply attested. In "Chippewa Half-Breed Scrip,"

etc., the fourth paragraph of the printed resolution of the house of representatives, calling for this information, was:

> "*Fourth*—A copy of said scrip, the manner of locating the same, whether by the parties to whom it was issued or by others, *whether located upon lands ceded by said tribe*, and all decisions of the department of the interior in relation to the issuance and location of said scrip."

As already shown, the use of the word "*located*" referred to cases where lands had been patented. This was the understanding of the land department; for, at pages 243 to 259 of the same publication, is given a tabulated list, containing description of the land and date of patent of all the Chippewa half-breed scrip locations that had been *patented*. Among others, at page 247, we find the name of Mary Dauphinais, showing her scrip had been located upon the land in controversy in the land office at Denver city, Colorado, and a patent issued on December 29, 1868. An actual count of this list of patented claims shows that prior to February 26, 1872, the date of the report of the commissioner of the general land office—out of a total number of about 630—196 patents had been issued for land within the state of Wisconsin, 134 patents for land within the state of California, thirteen patents for land *within* the state of Colorado, eight for land within the territory of Dakota, and one for land within the territory of Utah, making a total of about 352—*over one-half of the entire number of patents* issued on these claims for lands situated *without the states of Minnesota and Wisconsin*, where the treaty cession was located.

On page 7 of said report is the form of scrip in use up to 1868. It contains no provision limiting its use to the ceded lands.

On page 11 of the same publication is the form of scrip issued July 6, 1868, which on its face states:

"..... ..... (the scripee) will be entitled to select from any of the vacant lands, surveyed or unsurveyed, *which were ceded to the United States by the said treaty* of September 30, 1854, eighty acres of land, and a patent shall be issued to .... (the scripee), in the usual form therefor."

In locating land with Chippewa scrip at the time it was issued, the holder presented the same and selected from *any of the vacant public lands, anywhere*, the quantity of land to which the scrip entitled him. The holder of the scrip was not limited to vacant lands within the ceded territory. In the congressional publication, "Half-Breed Scrip—Chippewas of Lake Superior," near the bottom of page 11, is the following:

"October 19, 1868, a letter from said Steele was referred to this office for report by the department, requesting that the mixed-bloods entitled to land under the treaty of 1854, be permitted to locate their selections 'upon any of the territory acquired from their own people.' The office replied, October 22, remarking that the mixed-bloods had theretofore 'been permitted to locate their certificates *upon any of the lands of the United States subject to pre-emption and settlement.*'"

The same course of precedure is alluded to in letter No. 15 of O. H. Browning, secretary of the interior, found in the same publication, pages 47 and 48.

That scripees under this treaty were not limited to vacant lands within the treaty cession, is further demonstrated by the following official circular issued by the general land office, which is printed on page 308 of Land Laws of the United States by Zabriski, namely:

"General Land Office, November 24, 1857.

"Gentlemen—The commissioner of Indian affairs, on the 17th of December last, furnished this office with a list of 279

mixed-bloods of the Chippewas of Lake Superior, who are entitled to locations of eighty acres each, under the seventh section of the second article of the treaty of September 30, 1854, with the Chippewas."

"Second—By a decision of the department, dated 26th February, 1856, the parties, in locating their certificates, *are not restricted to the ceded lands in Minnesota, but are authorized to locate in any land district in the United States, open to entry or ordinary sale; (3d) are placed upon the same footing as pre-emptors; that is, have a right to locate upon unoccupied lands open to pre-emption, or subject to private entry.*"

In Land Laws, Regulations and Decisions, compiled by Lester, volume 2, page 371, we find the following circular of instructions issued by the commissioner of the general land office:

"Department of the Interior,
"General Land Office, May 13, 1865.

"Gentlemen—Referring to the circular of November 24, 1857, relative to the location of certificates issued under the seventh section of second article of the treaty concluded 30th September, 1854, with the Chippewas of Lake Superior, the following instructions, in regard to the location of the same, are given for your guidance, in accordance with the suggestions of the secretary of the interior, dated the 26th ultimo:

"First—The parties, in locating their certificates, *are authorized to locate, in any land district in the United States, lands open to entry or ordinary sale; and—*

"Second—*Upon any unoccupied public land subject to pre-emption, whether surveyed or unsurveyed.*"

By a subsequent circular, dated September 18, 1866, the last foregoing circular was modified to the extent of making the certificates inapplicable to unsurveyed lands, but the scrip was still held available for location, as follows:

First, then—

"The parties, in locating their certificates, are authorized to locate, in any land district in the United States, surveyed lands open to entry or ordinary sale; and—"

2 Lester's Land Laws, 373.

These circulars of the land department clearly demonstrate, that from November 24, 1857, the date of the circular issued by the general land office, down to October 22, 1868 (nearly eleven years), and possibly until the 12th of March, 1872—the date of the making of said congressional report—the scripees were, by the land officials, held entitled to locate their certificates upon *any of the lands* of the United States *anywhere*, subject to pre-emption and settlement, *whether within or without* the boundaries of the treaty cessions. And, as already seen, a number of void patents had been issued as the result of this erroneous construction of the law.

But there are other strong reasons why the act cannot be limited in its application to the curing of titles to unpatented claims within the treaty cession. Such an interpretation will violate well settled rules of statutory construction. The language of the act is general. It provides: "That the secretary of the interior be and is hereby authorized to permit the purchase, with cash, etc., of *such lands*."

WHAT lands?

Those within the treaty cession? NO.

The act says:

"Such lands (*wherever situate*, on the public domain) *as may have been located with claims* (not a legal entry) arising under the seventh clause of the treaty, etc."

As already shown, it covers entries, and claims that had passed to patent. The operation of the act is not by words confined to "claims" within any particular state.

"Unless some ground can be found *in the statute* for restraining or enlarging the meaning of its *general words*, they *must receive a general construction*, and the courts cannot arbitrarily subtract from or add thereto."

Tynan vs. Walker, 35 Cal., 634, 642.

"There is, then, no reason, founded in the language or policy of the clause, to insert *a restriction and locality* which have not been expressed by the legislature. On the contrary, upon general principles of interpretation, where the words are general, *the court are not at liberty to insert limitations not called for by the sense, or the objects, or the mischiefs of the enactment.*"

United States vs. Coombs, 12 Peters, 72, 79.

"General words in the statute must receive a general construction, and *if there be no express exception, the court can create none.*"

Demarest vs. Wynkoop, 3 Johnson's Chancery Reports, 129, 142.

Torrance vs. McDougald, 12 Ga., 526, 531.

"The statute is general, including by name all grants, not distinguishing between void and valid; and the plainest rules of propriety and justice require that *the courts should not introduce an exception, the legislature having made none.*"

Galloway vs. Finley, 12 Peters, 264, 298.

There are no words in the act limiting the territory within which its remedial provisions shall be operative. The "claims arising under the seventh clause of the second article of the treaty," *wherever situate*, whether within or without the state of Minnesota, are within the general words of the act. Therefore, so far as locality is concerned, as there is no limitation or exception in the language of the act, the courts cannot make any.

Again, the construction contended for by appellant would practically engraft a proviso on the general language of the act. In cases of provisos, the following is the rule of construction:

"We are led to the general rule of law which has always prevailed and become consecrated, almost, as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and *those who set up any such exception, must establish it as being within the words as well as within the reason thereof.*"

The United States vs. Dickson, 15 Peters, 141, 165.

Minis vs. United States, 15 Peters, 423, 445.

The language of the Supreme Court of the United States, in deciding a case where a remedial statute containing a proviso, may be considered with profit. The proviso was, that the act should not be construed to affect the rights of any person, claiming the same lands, whose claims had been previously confirmed under previous legislation. It was sought to construe this proviso so as to take the case of the claimant, Dodier, out of the act and leave his title imperfect. The court said:

"The general rule of law, is that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it, as being within the words as well as the reason thereof. * * * Why should Congress wish to exclude Dodier's title, if it did not conflict with any other, and was embraced by the general words of the statute? If it was left incomplete by the act of 1807, and completed by the act of 1812, there was certainly no reason for ex-

cluding it. It was within the power of Congress to favor the inhabitants of villages over other claimants; and the fact that he had documentary evidence of his title to this outlot, which the commissioners recognized and approved, affords no ground for supposing that congress meant to deprive him of the benefit of another law dispensing with this evidence, and still meeting the requirements of his case. This would lead to unjust consequences; for it would discriminate between villagers, and put claims, supported by paper-title with possession, on a less favored footing than those resting only on cultivation and possession. Besides, such a purpose is inconsistent with the avowed object of the law, which is to confirm to the villagers, without discriminating in favor of any class, their rights of property, whether held in severalty or in common. If congress had intended to exclude confirmed claims, the fair presumption is that it would have, in terms, excepted them, or by some form of words declared their exclusion."

Ryan vs. Carter, 93 U. S., 78, 83.

Again, the act of 1872 is a remedial one.

"There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; * * * *and it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy.*"

1 Chit. Black. Com., 87.

In applying this rule, "the treaty and the act of 1854 constituted the 'old law.'" Under the "old law," as correctly decided by the Supreme Court of California in the case of *Parker vs. Duff* (47 Cal., pages 554, 566), any patent for lands *not within the ceded territory*, issued under and by virtue of the treaty, which showed *on its face* that it was so issued, would be issued without authority, and was *void on its face.*

Those patented titles to land within the states of Minnesota and Wisconsin, but outside of the treaty cession, and those in other states and territories, were void, within the decision of *Parker vs.*

Duff. These conditions clearly constituted the "mischief" under the "old law;" yet Fee, instead of invoking a construction that would "*suppress* the mischief and *advance* the remedy," claims one at war with the purpose of, and that, too, without any language in the act warranting it.

> "Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon; * * * There has been in this respect, in the whole legislation of the country, a consistent observance of the rules of natural right and justice."
>
> Rector vs. Gibbon, 111 U. S., 276, 284.

Why should congress limit the perfecting of claims arising under the treaty, to the cession, when there were unpatented entries in the state of California, besides a large number of patented claims, both within and without the state of Minnesota, which required perfecting. There certainly was no reason for it. The consequences of such a construction would be unjust. It would be a discrimination between citizens of different states of the Union, and inconsistent with the avowed object of the law, which is to perfect, without discrimination, *all claims located* or held, or *entries made in good faith, wherever situate* on the public domain of the United States. If congress had intended to perfect only titles within the state of Minnesota, or in the treaty cession, it would undoubtedly have used language to that effect.

In conclusion, therefore, it must be held that the patent for the land in the controversy, issued to Henry C. Brown, under the act of congress of June 8, 1872, was authorized thereby.

First—Because the language of the act is without doubt or ambiguity. By its terms it covers "claims" that had passed into patent—i. e., those cases where the lands had been "*located*" prior to the passage of the act, as well as those claims where the first act had been done—i. e., the "entries" made. The language of the act is not by its terms limited to the curing of titles to unpatented claims, nor is the locality in which these claims have been made, limited or restrained by the words of the act, either to the treaty cessions, or the state of Minnesota. The national legislature having made no limitation or exception, by the words of the act, either as to locality or kind of claims (except that they be held or made innocently and in good faith, and arise under the treaty), the courts will not, by construction, make any. The congressional report before congress at the time the act was passed, showed that the mischiefs requiring remedy were "claims" that had passed into void patents, for lands in different states and territories of the Union, *outside of the ceded territory.* These mischiefs could only be suppressed, and the effectiveness of the act of congress of June 8, 1872, advanced, by including *all such claims*, where made innocently, as within the remedial terms of the act—not only for the purpose of protecting honest settlers, who had innocently used this scrip to acquire title to government land, but also to protect them from the erroneous rulings of the department officials who, for a period of about eleven years, had, by repeated official circulars, recognized this scrip as being receivable in payment for government lands, although situate without the state of Minnesota, and without the ceded territory.

No reason appears, and no language is used in the act, indicating that congress intended to favor the citizens of the state of Minnesota, as against the citizens of other states and territories of the Union, in like situation. Indeed, the fact that the act is a remedial one gives an emphatic denial to the existence of any such reason. What was said by the Supreme Court of Utah territory, upon this very act of congress, is conclusive of the question.

"It is a rule of law well known that a refusal of the legislative power to disaffirm or annul the acts of the officers of the government, when brought before them, is a legislative confirmation of such acts. Viewed in the light of these suggestions, it is impossible to conclude otherwise than that if Congress had not regarded these grants that had already been issued upon this mixed-blood Chippewa scrip as valid, it would have taken occasion, with the subject before it, when it was legislating concerning it, to have disaffirmed and annulled such grants. Not having done so, we repeat that the conclusion is inevitable that this amounts to and was intended by Congress to be a legislative affirmation of their validity, if any such were, indeed, needed."

Utah Mining & Manufacturing Co. vs. Dickert & Myers Sulphur Co., 21 Pac. Repr., 1002, 1008.

The question of innocence and good faith, on the part of the holder of a claim, seeking the benefit of the act, is a matter of fact, wholly and solely within the determination of the secretary of the interior. The issuance by him of a new patent, to an applicant therefor under this act, is *absolutely final and conclusive* of this question, upon all other tribunals. Therefore, the patent to the land in controversy in this case was authorized by and was lawfully issued under the said act of congress of June 8, 1872.

ACT OF APRIL 24, 1820.

While Fee did not set out in his answer *in haec verba* the United States patent issued to Henry C. Brown, he alleged that it contained a recital that Brown made full payment for the land in controversy according to the provisions of the act of congress of April 24, 1820. (R., page 17, folio 61.) He insists that because, under this act of April 24, 1820, *private* entries are never permitted until the lands have been first exposed to public auction, that therefore the patent in this case is void, for alleged non-compliance with this act. To this objection it may be answered:

First—Appellant does not show by his own pleadings that the patent land in controversy is issued *only* under the act of April 24, 1820. He says that—"said patent further provides (quoting, as we presume, from the patent) that the United States of America, in consideration of the premises, and '*in conformity with the several acts of congress* in such case made and provided, hath given and granted,'" etc. (R., page 17, folio 32.)

Second—To this objection it may further be answered in the language of his quotation from *Eldred vs. Sexton* (19 Wal., 189), "That private entries are never permitted until after the lands have been exposed to public auction, * * * *unless congress by special act order otherwise*," etc.

"With respect to the public domain, the constitution vests in congress the power of disposition and of making all needful rules and regulations. *That power is subject to no limitation.* Congress has the absolute right to prescribe the times, the con-

ditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made."

Gibson vs. Chouteau, 13 Wal., 92, 99.

The United States vs. Gratiot, 14 Pet., 526, 537.

A forfeiture of a pre-emption warrant already incurred may be waived.

McCargo vs. Stephens, 9 Wheat., 502, 512.

Where the validity of an act of congress, absolutely and unconditionally confirming a land grant, was attacked as being unlawful, because the Mexican colonization laws, in force when the grant was made, did not authorize a lawful grant for more than a certain amount, the court said:

"This was matter for the consideration of congress; and we deem ourselves concluded by the action of that body. The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal. In Ryan *et al.* vs. Carter *et al.*, *supra*, page 78, we recognized and enforced, as the settled doctrine of this court, that such an act passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by a law as well as by a patent pursuant to law."

Tameling vs. United States Freehold, etc., Co., 93 U. S., 644, 663.

"That it was competent for congress to deal with the land as it chose does not admit of question."

Hosmer vs. Wallace, 97 U. S., 575, 581.

If, before the act of June 8, 1872, the land in controversy had to be offered at public sale, and was not so offered, congress had the power to waive this

requirement, by providing that all "claims arising under" this treaty, held by innocent parties in good faith, might be perfected without it.

Therefore, if the claim of appellant be true, that this grant was, as originally made, in violation of the rule laid down by the act of April 24, 1820, nevertheless, the requirement of that act must be held to be expressly waived by the act of congress of June 8, 1872—all of which is nothing more than saying that by this remedial act, congress has provided otherwise, than in cases of the usual and ordinary entries under the General Land Laws.

Third—This same objection may be further answered:

> "Upon issuance of the patent *the presumption obtains* that *all the requirements preliminary to its issue* have been complied with. The court holds that this presumption is not open to rebuttal in an action at law, and that the patent itself is unassailable, except by a direct proceeding in equity for its correction or annulment."

Poire vs. Wells, 6 Colo., 406, 409.

The land department of the government would naturally be presumed to have the only information obtainable upon the question, whether the land in controversy had ever been offered for public sale. In the issuance of the patent, the land officials must necessarily pass upon and decide this question. The objection here made is similar to the objection passed upon in the case of *Minter vs. Crommelin*, by the Supreme Court of the United States. There, the sixth section of the act of congress of 1817 provided, that no land reserved to a Creek warrior, should be offered for sale by the register of the land office, unless specially directed by the secretary of the treasury.

"Both by the treaty and the act of congress it was declared that if the Indian abandoned the reserved land, it became forfeited to the United States. The fact of abandonment, the secretary was authorized to decide, and if he did so find, he might then order the land to be sold as other public lands. The rule being that the patent is evidence that all previous steps have been regularly taken to justify making of the patent and one of the necessary previous steps here *being an order from the secretary to the register to offer the land for sale*, because the warrior had abandoned it, *we are bound to presume* that the order was given. Such is the effect as evidence of the patent produced by the plaintiffs."

Minter vs. Crommelin, 18 How., 87, 89.
Smelting Co. vs. Kemp, 104 U. S., 636, 646.

Therefore, under this decision of the Supreme Court of the United States, the patent in this case is *conclusive* evidence that the requirement insisted upon by appellant—that the land in controversy must have been first offered for public sale—was complied with.

In conclusion, therefore, the insistment of appellant, that the patent in this case is void, because given for land which was not first offered at public sale, as alleged to be required by the act of congress of April 24, 1820, is unfounded:

1. Because he shows by his own pleadings and argument that the patent does not purport to be issued under the act of congress of April 24, 1820, *alone*, but *also* under "the several acts of congress" for the disposition of public lands. Appellant has not claimed and does not undertake to show that there is no act of congress under which this patent can be sustained. The patent, rather than be defeated, must be held good, if there is any act which

justifies its issuance. The question, under what act did the patent issue, is one only to be asked by the government.

2. If the requirement of the act of April 24, 1820, would ordinarily apply, congress, by special act, namely, the act of June 8, 1872, has waived the requirement.

3. The requirement, that the land must be offered at public sale, before subject to private entry, is a matter of fact, the determination of which is wholly and entirely within the jurisdiction of the land department of the government. The United States patent in this case is, therefore, *conclusive* evidence that this requirement was complied with. Upon this point, the patent cannot be contradicted or impeached by Fee.

It is, therefore, respectfully submitted upon the merits of the case, that the decision of the Supreme Court of the State of Colorado, reported in 17th Colorado, 510, and set forth at length on pages 26 to 34 of the record, correctly disposes of the merits of this case, and, therefore, the judgment of the court below should be affirmed.

WANT OF JURISDICTION.

But, as this case comes here by writ of error from the Supreme Court of the state, it is respectfully submitted, this court is without jurisdiction, unless there be a federal question involved. On this point, in addition to what was urged in the brief filed in support of the motion to dismiss and affirm, we wish to make a few additional suggestions.

The whole case of Fee consists of an attack upon the United States patent issued to Brown, in December, 1876. Although Fee made application to the land officers to make an entry of this land, yet the entry was not in law made, unless the land subject to entry, and entry was allowed by the land officers.

Fee's position was not that of a *de jure* entry man. At most, he was only one who had a color of right, by attempted compliance with the law on his part, but without recognition by the land officials on their part. Whether or not he had any such *de jure* right as a proposition of law, was not, and never has been, passed on in this case. He has been conceded a position authorizing him to attack the patent to Brown.

"To constitute a federal question, the validity of the federal *authority must be primarily denied*, and the *denial* made *the subject of direct inquiry*."

Cook County vs. C. & C. Canal Co., 138 U. S., 635, 653.

"Where our jurisdiction depends upon the denial by the state court of a right, title, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, it *must appear on the record* that such title, right, privilege or immunity was *specially set up* or claimed at the proper time and in the proper way, and that the *decision was against the right so set up* or claimed."

Cal. P. Works vs. Davis, 151 U. S., 389, 393.

"The act of congress limits the right of review in cases involving the construction of the federal statute to cases where the state court has decided *against* the title, right, privilege or immunity set up or claimed under the statute."

Missouri vs. Andriano, 138 U. S., 496, 499.

McNulta vs. Lockridge, 141 U. S., 327, 330.

The decisions of the courts below have uniformly sustained the patent to Brown. If Fee's right to enter the land had been a *de jure* one, and had been decided against, instead of it being assumed that he had a right to attack the patent to Brown, then perhaps Fee might have been in position to maintain this writ of error. In the entire case, from beginning to end, none of the decisions of the state courts have either challenged or decided that the treaty or law of 1854, or the act of 1872, or any other federal law, were not valid laws within the power of congress to pass. And if there had been such holding, it must have been to the damage of Brown, and he alone would be entitled to sue out this writ of error. The whole case of Fee simply hinges upon a question of general law, viz.: the construction of the treaty and the acts of congress of 1854 and 1872.

"Where the *validity* of a law is not drawn in question, but *merely its construction*, no federal question arises."

Lloyd vs. Matthews, 155 U. S., 222, 227.

But Brown's patent was sustained, without examining or denying Fee's right to enter the land.

"If the case was decided on grounds broad enough in themselves to sustain a judgment without reference to the federal question, this court will not entertain jurisdiction."

D. C. & N. Co. vs. Reybold, 142 U. S., 636, 643.

It is, therefore, respectfully submitted that the case comes within the familiar rule that the decision is broad enough to sustain the judgment without reference to the federal question, viz.: a decision sus-

taining the United States patent, and this court is without jurisdiction.

Most respectfully submitted,

JAMES H. BROWN,
Attorney for Defendant in Error.

Supreme Court of the United States.

October Term, 1895.

JOHN D. FEE,
Plaintiff in Error,

v.

HENRY C. BROWN, Executor of Jane C. Brown, Deceased,
Defendant in Error.

No. 165.

Reply of Plaintiff in Error to Brief of Defendant in Error.

J. M. VALE,
Attorney for Plaintiff in Error.

C. C. CLEMENTS,
FRED. BETTS,
of Counsel.

WASHINGTON, D. C.:
Gibson Bros., Printers and Bookbinders.
1896.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN D. FEE,
PLAINTIFF IN ERROR,

v.

HENRY C. BROWN, EXECUTOR OF JANE C. BROWN, DECEASED.

No. 165.

Reply of Plaintiff in Error to Brief of Defendant in Error.

The contention that the patent under which defendant in error claims to hold against the homestead right of plaintiff in error should have been set up *in hæc verba* by the plaintiff in error in his answer, and that so setting the patent up is essential to the determination by this court of the question whether the said patent is void on its face, is fallacious, because profert of the instrument was waived by both parties to the suit in the stipulation filed in the cause (Record, p. 20, and brief of plaintiff in error, pp. 13–14), which stipulation provides that for the purpose of these proceedings the plaintiff (defendant in error) is considered as having offered in evidence a patent from the United States to one Henry C. Brown for the premises in dispute, said patent

bearing date December 1st, 1876, and also certain mesne conveyances from Henry C. Brown to Jane C. Brown over the objections of the defendant (plaintiff in error), the cause to be fully tried in the supreme court of Colorado on the first cause of action set forth in the complaint, the separate answer thereto, and the demurrer to said answer with like effect as if said patent and the said mesne conveyances had been offered in evidence by the plaintiff and directly passed upon by the court and admitted in evidence and proper exceptions thereto preserved by the defendant, and all the papers described in defendant's answer, or set up *in hæc verba* in said answer, had been likewise offered in evidence on the actual trial of the cause, the same overruled and proper exceptions preserved thereto. Therefore it only remains to see whether the answer of the defendant in the court below (plaintiff in error) is sufficient in its averments as to the contents of the patent to disclose to the court, on reading the same, wherein the patent is void on its face.

The answer avers the qualifications of plaintiff in error under the homestead laws, his settlement upon the land, and his compliance with the laws of the United States applicable to the acquisition of title to the public lands of the United States by homestead entry thereof (Rec., p. 9). It further distinctly sets out the history of the scrip issued to Mary Dauphinais (for the purpose of identification), its assignment in blank with power of attorney, its location outside of the ceded territory by Witter upon the land in controversy, the patent issued to Mary Dauphinais upon the said scrip (Rec., pp. 10, 11), the conveyance by Witter to Brown under power of attorney, alleged to be void, from Dauphinais to Henry C. Brown (Rec., p. 12), the instruction of the Commissioner of the General Land Office referring to the decision of the supreme court of California in Par-

ker *v.* Duff (47 California, 566), the surrender and cancellation of the Dauphinais patent, the conveyance by Henry C. Brown to the United States of the land in controversy, the application of Henry C. Brown to purchase under the act of June 8, 1872, the approval of that application by the Commissioner of the General Land Office, and the issuance to Henry C. Brown, by reason of these proceedings, of certificate No. 1728, certifying that said Brown had purchased of the Register of the United States Land Office at Pueblo, Colorado, the land involved in the suit, with the endorsements upon said certificate (Rec., pp. 10 to 16); there is also set up in said answer the receipt of the Receiver of said Land Office, with the endorsements thereon (R., p. 16); it is further alleged in said answer that certificate No. 1728 was deposited in the General Land Office, and that by virtue thereof the President of the United States issued to Henry C. Brown a patent for the land in controversy; that said patent refers therein to the aforesaid certificate No. 1728, and that said patent recites that the said Henry C. Brown has deposited in the General Land Office of the United States the said certificate of the Register of the Land Office at Pueblo, Colorado, whereby it appears that said Henry C. Brown has made full payment for the eighty acres in controversy, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provisions for the sale of public lands," and that said patent provides that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given, granted, and by these presents do give and grant, unto the said Henry C. Brown and to his heirs the said tracts above described (Rec., p. 17). The averment that certificate No. 1728 is referred to in said patent is distinctly set forth (Rec., p. 17). From these

allegations it plainly appears that the patent contains a reference to certificate No. 1728, and in looking at that certificate and the papers to which it refers and upon which it was issued it is seen that the consideration for the land was the surrender of the former patent issued to Dauphinais upon the Chippewa half-breed scrip 45D, and located in the manner set forth in the answer of plaintiff in error, the reconveyance of the land in controversy to the United States, and the sum of $2.50 per acre, in accordance with the instructions of the Commissioner of the General Land Office contained in his letters of May 11, 1875 (Rec., p. 13), and July 19, 1876 (Rec., p. 15), under the authority of the act of April 24, 1820, and the act of June 8, 1872.

It is submitted that the allegations contained in the answer of plaintiff in error are sufficiently certain to declare the patent to be void on its face, when read in connection with the records referred to on its face. The defendant in error is bound by his stipulation as well as by his demurrer to admit as true the answer of the plaintiff in error, and to stand on the facts as presented in the complaint and the answer. And enough of the context of the patent is disclosed to the court to enable it to be seen, on inspection, upon what consideration the patent was granted, what authority of law existed therefor, and that the officers of the United States granting the patent acted without jurisdiction.

The "patent" referred to in the stipulation must be presumed to conform to law in the form thereof, its signing and execution; the allegations in the answer affirmatively set up the reference therein to certificate No. 1728; that certificate, essentially a part of that patent by the reference thereto, is set out with its accompanying papers in the answer of plaintiff in error (Record, pp. 15–16). That the patent contained a reference to the certificate No. 1728 is true, and is admitted to be true; it is in that reference and

the certificate and its accompanying papers, all set ont in the record, that the patent is seen to be void on its face.

It is submitted that it is not necessary to look beyond the reference to certificate No. 1728 and its accompanying papers to discover that the patent was issued without jurisdiction on the part of the officers of the United States issuing the same, and therefore that it is not essential to have set out the patent *in hæc verba*. Enough of the patent is disclosed to the court to show that it is void on its face. The question of setting up the patent in *hæc verba* is raised here for the first time; on the averments as they are set out in the answer, and the issues made upon the record as filed in this court, the supreme court of Colorado ruled that the act of 1872 authorized the issuance of the patent to Brown, and that the Secretary of the Interior did not act without authority of law and without jurisdiction in granting it. (Record, pp. 33 and 34.) No other question is before this court, and it is urged that the record is ample to disclose to the court the error of the court below in so holding, if any there be.

The contention that the reference in the patent to the certificate No. 1728 shows no repugnancy to the granting clause, and therefore that the patent is not void upon its face, is not well taken because the reference to the indicated certificate was part of the premises in consideration of which the grant was made, and therefrom the court is enabled to look at the consideration and determine the question of jurisdiction of the officers of the Land Department to issue the patent. But, further, the issuance of the patent upon the certificate No. 1728, under the act of 1820, where the lands had not been offered, as is distinctly alleged in the answer of plaintiff in error, is not only repugnant to the granting clause in the patent, but also to the laws of the United States applicable to the disposition of the public lands.

The learned counsel for defendant in error has also fallen into a mistake in his contention that the question raised is a question of construction of the patent under which defendant in error claims to hold; there is no question of construction raised. The question is one of jurisdiction of the officers of the Land Department to issue the patent, and no other question is involved.

In his discussion of the scope of the remedial act of 1872, counsel for defendant in error loses sight of the language of the act limiting the authority of the Secretary of the Interior to such *lands* as may have been located with claims arising under the seventh clause of the second article of the treaty of September 30, 1854. He gives no weight to the plain phraseology of the act of 1854 (10 Stats. L. 598) authorizing the negotiation of the treaty granting to each head of a family in fee simple a reservation of eighty acres, to be selected within the ceded territory and extending that privilege to mixed-bloods belonging to the tribe, and to the words of the designated clause of the treaty granting to each head of a family or single person over the age of twenty-one years of the mixed-bloods eighty acres of land to be selected by them under the direction of the President. He asks in large capital letters in his brief (p. 24) "WHAT lands? Those within the treaty cession? NO." But he fails to show by what statutory authority the lands referred to in the act of 1872—that is, such as may have been located under the seventh clause of the second article of the treaty—may be extended *beyond* that cession. Clearly such lands did not embrace any lands of the public domain wheresoever situated, and as clearly the restriction contained in the act of 1854, the treaty of 1854, and the remedial act of 1872, when read together, confine the lands to the territory ceded by the treaty of 1854.

The contention that two classes of cases are provided

for by the act of 1872 (p. 18 of his brief) is wholly untenable; the act provides for nothing of the kind; the "claims" mentioned in the act as held or owned in "good faith" are by the plain words of the act claims arising under the 7th clause of the 2d article of the treaty, and the question of "good faith" does not extend beyond such lands as may have been located with claims arising under that clause. Those are the plain words of the act, and it is submitted they are susceptible of no other construction than their plain import.

In connection with his contention respecting the remedial scope of the act of 1872, counsel for defendant in error lays down a further fallacious proposition, namely, that the mischief to be remedied was the effect of the ruling of the court in Parker *v.* Duff (47 California, 566) holding a patent on a scrip location outside of the ceded territory to be void on its face, and the ruling of the Secretary of the Interior in harmony with that decision. That was not the mischief to which the act was directed. The decision of the California court occurred long after the passage of the act of 1872 (in 1874), and was against the remedial operation of that act as affecting lands outside the ceded district whether considered in that decision or not. On an examination of the history of the times, as disclosed in the public document referred to in the briefs filed herein on both sides, it will be found that an extensive fraudulent traffic in the scrip had grown up under methods adopted for the issuance of the scrip, or certificates of identification, and it was this fraudulent traffic and the appropriation of the public domain thereunder that was the existing mischief to be corrected, and against which holders in good faith of lands located with claims arising under the 7th clause of the 2d article of the treaty were protected by the said act. (See pp. 14, 15, 16, and 17, House Ex. Doc. 193, 42d Con-

gress, 2d session.) The issuance of the scrip itself was also a mischief, because the issuance thereof was without authority of law or treaty, and, however innocently intended as a means of identification, became the subject of fraudulent traffic (see p. 17, Ex. Doc. cited *supra*.) Now, at this time, within the ceded territory, many locations in good faith had been made on the part of innocent holders of fraudulent scrip, and to relieve those holders in good faith the remedial act of 1872 was passed. It will be seen by the same Executive Document (Schedule F, pp. 136 to 144) that 116 persons located land at St. Cloud, Minn., in the months of February, April, and May, 1870, under the provisions of the 7th clause of the 2d article of the treaty of 1854, and in a majority of the locations the person named was never connected or belonged to the Chippewas of Lake Superior. Additional applications had been made at Duluth and Lake Superior land offices, there being 245 at the latter place (pp. 136 to 146 of the Executive Document cited *supra*.) It is disclosed on page 317 of said Executive Document that the Secretary of the Interior, on March 19, 1872, directed that all the so-called scrip, except the "Gilbert scrip," be declared illegal, fraudulent, and void, and all entries of land made with said scrip, and unpatented, to be cancelled. It is therefore clear that a remedial act, such as that of 1872, might well be passed by Congress to protect the owners and holders in good faith under such fraudulent locations of the lands located with claims arising under the designated clause of said treaty within the ceded territory as provided by the treaty and act of 1854.

The word "claims" is used in the act of 1872 to designate the right to "eighty acres of land" granted by the "terms of the 7th clause of the 2d article to" each head of a family or single person over twenty-one years of age of the mixed-bloods belonging to the Chippewas of Lake Su-

perior, as limited by the act of 1854, cited *supra*, and is susceptible of no other definition or signification. The word "claims" cannot signify the paper writing known as "certificates of identification," or "scrip," issued to the persons of mixed blood, because those "certificates" or "scrip" were not issued under the authority of the treaty, nor indeed under the authority of law.

The issuance of the certificates of identification by the office having jurisdiction of Indian affairs was merely for the convenience of the "mixed blood" to identify him to the officers of the Land Department. It was a mere Departmental method. The form of the certificate or scrip as issued, partly set out in the brief of defendant in error and set out in full in the Executive Document cited *supra* (House Ex. Doc. 193, 42d Cong., 2d session, p. 11), is as follows:

No. —.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., ———, 18—.

I hereby certify that —— ——, of ———, has furnished evidence satisfactory to this Department that —— —— is one of the persons referred to in the seventh clause of the second article of the treaty concluded between the United States and the Chippewa Indians of Lake Superior and the Mississippi, September 30, 1854, which seventh clause of said article of said treaty is as follows, viz: (Here follows a quotation of the treaty provision in question.) And the said —— —— is entitled to eighty acres of land as therein provided, and that upon the presentation of the certificate at a local land office having jurisdiction, —— —— will be entitled to select from any of the vacant lands, surveyed or unsurveyed, which were ceded to the United States by the said treaty of September 30, 1854, eighty acres of land, and a patent shall be issued to —— —— in the usual form therefor.

This certificate is not assignable and it is expressly declared that any sale, transfer, mortgaye, assignment, or pledge thereof, or of any right accruing under it, will not be recognized as valid by the United States, and that the object of this certificate is to identify the said above-named —— —— as one of the persons entitled to the benefit of the provisions of the seventh clause of the second article of the treaty aforesaid.

Given under my hand on the day and year first above written.

—— ——,
Commissioner.

In the case now before the court, the answer discloses that the certificate identified Mary Dauphinais as being one of the persons described in the provisions contained in the treaty of September 30, 1854, as being entitled under the seventh clause of the second article of said treaty to eighty acres of land as therein provided, and that any sale, transfer, mortgage, assignment, or pledge of the same or any right accruing thereunder would not be recognized as valid by the United States. (Record, p. 10.)

When read in connection with the history of the times which, as heretofore mentioned, discloses that the certificates of identification were fraudulently issued in great numbers, and that such fraudulent certificates were in fact located upon lands within the ceded territory, subject to be taken by persons designated in the treaty, it is plain that innocent holders of such claims existed within the ceded territory, and it is not necessary to go beyond that territory to give full effect to the remedial statute.

The distinction between "such lands as may have been located with claims," the owners whereof were allowed to *purchase* under the act of 1872, and "the owners and holders of such claims in good faith" who were permitted to "*complete their entries and perfect their titles* under such claims" is

to be found in the varying circumstances of the persons within the ceded territory, who had acquired *bona fide* rights under and by virtue of the designated clause and article of the treaty and none others. The restrictive clause of the act lies in its remedial action being extended no further than to such lands as may have been located with claims arising under the 7th clause of the 2d article of the treaty as governed by the act of 1854, and the vital error of the supreme court of Colorado lay in holding that "the language of the statute is general and sweeping; it contains no words expressly excluding from its purview lands then patented, unoffered lands, and lands outside of the ceded territory." (Record, p. 31.)

It appears from the public document (p. 5) cited *supra* that the issuance of the "scrip," so called, was objected to by the official action of the Commissioner of the General Land Office, and Secretary Harlan decided, on June 9, 1865, that the treaty did not contemplate the issuance of scrip, but patents for the lands to which the mixed-bloods might be entitled (Ex. Document, p. 7), and on October 28, 1867, Secretary Browning concurred in the opinion of Secretary Harlan (pp. 8 and 9). The letter, No. 15, of Secretary Browning (Doc., p. 47) referred to by counsel for defendant in error (p. 22 of his brief) confined the limit within which the so-called scrip might be received for lands to the territory ceded to the United States by the 1st article of the treaty of 1854, or within the limits of the territory ceded by the 2d article of the treaty between the United States and the Red Lake and Pembina bands of Chippewas, of October 2, 1863, or within the limits of the territory ceded by the 1st article of the treaty between the United States and the Chippewas of the Mississippi, of May 7, 1864.

The rulings of the Executive Departments have not in fact been uniform upon the question of where the scrip

would be received for lands, but that fact cannot enlarge the jurisdiction of the officers of the land department to dispose of the public domain without authority of law and grant patents therefor.

Counsel for defendant in error lays down the proposition (p. 33 of his brief) that if the patent was issued in violation of the act of April 24, 1820, nevertheless the requirement of that act must be held to be expressly waived by the act of June 8, 1872, that act providing otherwise than in cases of the usual and ordinary entries under the general land laws. The answer to this is that neither by words nor by implication is the act of 1820 repealed or modified by the act of 1872, except as to lands located with claims arising under the 7th clause of the 2d article of the treaty of 1854. It is submitted the act of 1872 is susceptible of no other construction, and that cash sales of unoffered lands were not authorized by that act outside of the ceded territory.

Federal Question.

The federal question is not presented upon the validity of any law of the United States. Counsel for defendant in error has not differentiated between a question involving the validity of a law and the denial of a right, title, privilege, or immunity under federal authority; the federal question is presented in this case in the denial to the plaintiff in error of his right to take the land in controversy under and by virtue of the laws of the United States applicable to the acquisition of title to the public domain; the State court has decided against that right, not in favor of it; the decision of the question was necessary to the determination of the cause, and the judgment as rendered could not have been rendered without deciding it. Against that right defendant in error set up title by virtue of a patent

issued by the United States; to this answer was made by the plaintiff in error showing the contents of the patent from the United States, and claiming the same to be void on its face, and that it conveyed no title nor cast a cloud upon the title of the United States; that no jurisdiction was vested by the laws of the United States in the Land Department to issue the patent outstanding upon the land; that therefore the land is public land of the United States, and that the settlement of plaintiff in error thereon under the homestead laws cannot be disturbed by reason of such outstanding patent. This was the issue determined below, and plainly involved a right under the authority of the laws of the United States.

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